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IN THE

Supreme Court of the United States

October Term, 1959

PAUL E. KERN, JEROME PRINCE and CHARLOTTE HEINE,

Petitioners,

v.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March, 1960

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TABLE OF ABBREVIATIONS AND REFERENCES

A.: Page references to Petitioners' Appendix in the Court of Appeals.

Alterations: Alterations and Modifications to Plan of Reorganization dated February 25, 1958 as Amended, proposed on behalf of Kentucky Public Creditors.

American: American Fuel and Power Company, one of the Debtors.

American Notes: Five Year 7% Convertible Gold Notes, due July 1, 1934, of American Fuel and Power Company.

American public creditors: The public holders of $1,905,100 principal amount of the American Notes.

American System: The natural gas companies consisting of American Fuel and Power Company and its wholly-owned subsidiaries; Inland Gas Corporation; and Kentucky Fuel Gas Corporation.

Appendix A, Appendix B, Appendix C: Appendices to this petition.

Chapter X: Chapter X of the Bankruptcy Act, §§ 101-276, 11 U. S. C. §§ 501-676.

Columbia: The Columbia Gas System, Inc.

Debtors: Inland Gas Corporation, American Fuel and Power Company and Kentucky Fuel Gas Corporation.

Inland: Inland Gas Corporation, one of the Debtors.

Inland Bonds: First Mortgage 6½% Sinking Fund Gold Bonds, due February 1, 1938, of Inland Gas Corporation.

Inland Debentures: Second Mortgage Ten-Year 7% Sinking Fund Debentures, due February 1, 1938, of Inland Gas Corporation.

Inland Trustee: Ben A. Williamson, Jr., Trustee of Inland Gas Corporation.

Kentucky: Kentucky Fuel Gas Corporation, one of the Debtors.

Kentucky Bonds: First Mortgage 6½% Sinking Fund Gold Bonds, due June 1, 1942, of Kentucky Fuel Gas Corporation.

Kentucky Debentures: Ten-Year Convertible 6½% Sinking Fund Gold Debentures, due June 1, 1938, of Kentucky Fuel Gas Corporation.

Kentucky public creditors: The public holders of $2,778,600 principal amount of Kentucky bonds and debentures.

Plan: Plan of Reorganization proposed by the Trustees, dated February 25, 1958, as Amended.

Post-Bankruptcy Interest; Interest accruing after institution of equity receivership proceedings for each of the Debtors.

Pre-Bankruptcy Interest: Unpaid interest at date of institution of equity receivership proceedings for each of the Debtors.

Public Creditors: Public holders of (a) $1,905,100 principal amount of American Notes; (b) $2,236,600 principal amount of Kentucky Bonds; and (c) $542,000 principal amount of Kentucky Debentures, or any class of them.

SEC: United States Securities and Exchange Commission.

System: The natural gas companies in the American System consisting of American Fuel and Power Company and its wholly-owned subsidiaries; Inland Gas Corporation; and Kentucky Fuel Gas Corporation.

Trustees: Ben A. Williamson, Jr., Trustee of Inland Gas Corporation and of Kentucky Fuel Gas Corporation; and Clinton M. Harbison, Trustee of American Fuel and Power Company.

Underwriters: Underwriters of the new common stock to be issued under the Alterations.

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Petitioners,

v.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on January 27, 1960.

Opinions Below

The opinion of the Court of Appeals (per Judges Martin and Cecil) and the dissenting opinion of Judge Miller, printed in Appendix B, *infra*, pages 4c-13c and pages 13c-20c, are not yet officially reported. The oral opinion of the District Court (A. 66a-69a) * is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 27, 1960 (Appendix B, *infra*, p. 20c). On February 23, 1960 the Court of Appeals stayed its mandate pending application for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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* A Table of Abbreviations and References appears in the forepart of this petition, pages v, vi.

Questions Presented

1. Whether a District Court supervising corporate reorganizations proceedings under Chapter X of the Bankruptcy Act may refuse to hear, prior to consummation of a confirmed plan, a proposed alteration, predicated on reliable and practical underwritings made possible by improved economic conditions and producing at least $3,500,000 more in cash than the confirmed plan, which provides cash payment in full of all prior claims and thereby enables the sole remaining class of public creditors to salvage on account of its unpaid claims the materially increased value of the residual assets.

2. Whether the general rule disallowing post-bankruptcy interest in insolvency proceedings is subject to the exception that interest accruing after the institution of the proceedings is payable to unsecured creditors out of surplus assets when the bankrupt or debtor proves "solvent", and whether this exception requires revision of the distribution under a confirmed but unconsummated plan, promulgated when the debtor was insolvent, so as (i) to prevent a windfall (over and above full satisfaction of its allowable claims against the "solvent" debtor) to a parent corporation claiming through the debtor's stockholders, and (ii) to make the sizeable surplus available, instead, to the only class of public creditors of the debtor whose claims for post-bankruptcy interest have not been paid.

Statutes Involved

The pertinent provisions of Chapter X of the Bankruptcy Act (52 Stat. 883, 11 U. S. C. §§ 501 *et seq.*) are set forth in Appendix A, *infra*, pages 1c-3c.

Statement

The many years during which these corporate reorganization proceedings have been pending have not been sterile years. They have been marked by significant op-

erational changes, vast economic improvements and considerable accumulations of unneeded cash. They have witnessed the periodic retirement of the claims of senior classes of public creditors through payments in cash. Approximately $15,000,000 of estate funds have been distributed over the years in satisfaction of such claims (together with full interest to the date of payment), leaving the Kentucky public creditors and Columbia as the only unpaid creditors of Inland. In substance, if not literally, these lengthy proceedings have nurtured a series of piecemeal plans (instead of a single comprehensive plan) crowned with the highest achievement attainable under the Bankruptcy Act: cash payment of claims in full. What still must be accomplished is a fair and equitable distribution of the residual valuable assets between Columbia, the adjudicated wrongdoer whose illegal and inequitable conduct seriously injured innocent public investors,[1] and

[1] As part of a scheme for gaining control of the System for the purpose of eliminating the threat of competition, Columbia acquired at saleable discounts substantial amounts of the debtors' debt securities, as well as stock and other interests. It promptly sought to wreck the debtors by throwing them into judicial proceedings, later supplanted by the present proceedings. The court below subsequently determined that Columbia's inequitable and unlawful conduct in accomplishing its scheme required that all of its claims against each of the debtors be subordinated to "the claims of all other creditors of every class" in the System. *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461, 470; 153 F. 2d 101. This was the culmination of findings that Columbia "drew to itself the lifeblood of all the debtors and picked the flesh from the bones of these corporate entities," that its abhorrent and immoral scheme violated Federal antitrust laws and that "the result of its misconduct was to defraud the minority interests of the debtors". *In re American Fuel & Power Co.*, 122 F. 2d 223, 228, 229; see *In re Inland Gas Corp.*, 187 F. 2d at 815. To carry out the subordination effectively, the public holders of debt securities of American and Kentucky, companies owning substantially all of the stock of Inland, were held to be "creditors or quasi-creditors of Inland". *In re Inland Gas Corp.*, 187 F. 2d 813, 817. Columbia's claims against each of the debtors were thus subordinated to (a) the direct claims of the public creditors against their respective debtors, and (b) as against Inland's assets, to the claims of the public creditors of American and Kentucky.

the sole remaining creditor class of Columbia's victims: the public holders of Kentucky Bonds and Debentures.

The most recent Plan was promulgated on the basis of financial conditions prevailing as of December 31, 1957, when Inland was still insolvent (A. 4a, 9a). Appeals from the District Court's confirmation of the Plan, resulting in affirmance (262 F. 2d 510), were finally disposed of on April 27, 1959 (359 U. S. 979). Within a few days thereafter, on May 5, 1959, there emanated from responsible investment bankers, insurance companies and underwriters of the highest repute, who had never previously participated in these proceedings,[2] firm financial commitments producing for reorganization purposes some $3,500,000 more in cash than the Plan provides (A. 34a-54a, 57a). This increase meant that Inland, the only debtor with assets of value, was no longer insolvent. All senior public creditors had been paid in full with post-bankruptcy interest; there was now sufficient cash to pay in full the allowable claims of Columbia against Inland with post-bankruptcy interest on secured claims; and there was a considerable surplus sufficient not only to satisfy the principal amount of the claims of the Kentucky public creditors, the only other unpaid claimants against Inland, but also to accord them some participation for their large claim for post-bankruptcy interest.[3]

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[2] These were: KIDDER, PEABODY & CO., INCORPORATED—nationally-known investment bankers (A. 34a-35a); MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY and HOME LIFE INSURANCE COMPANY—well-known insurance companies (A. 36a-45a); EMPIRE TRUST COMPANY—New York City banking institution (A. 46a-48a); DEMPSEY & COMPANY and H. M. BYLLESBY AND COMPANY, INC.—Midwestern investment bankers and underwriters (A. 49a-54a).

[3] The claim of the Kentucky public creditors at August 31, 1959 amounted to $7,658,823, of which $2,376,012 represented unpaid principal and $5,282,811 represented unpaid interest. The principal of Columbia's claims against Inland amounted to $2,143,467 and the interest to August 31, 1959 on its secured claims aggregated $3,637,197, or a total of $5,780,664. This calculation does not include post-bankruptcy interest on Columbia's unsecured claim

Relying upon Sections 222 and 229 of Chapter X (11 U. S. C. §§ 622, 629), which expressly permit a plan to be altered or modified "before or after its confirmation" and prior to its "substantial consummation", and upon the well-recognized "solvency" exception to the general rule disallowing post-bankruptcy interest to unsecured creditors of insolvent debtors, petitioners presented their application to alter the Plan to take advantage of the newly-available financings and underwritings (A. 9a-14a). This was prior to the taking of any steps to consummate the Plan (A. 4a-7a, 57a-59a).

The Plan and the Alterations may be compared as follows:

1. Both provide for an internal reorganization; and both provide for a practically identical capitalization, consisting of $4,000,000 to $4,250,000 of institutional indebtedness and new common stock (A. 22a-23a).

2. The Plan limits the Kentucky public creditors to cash payment of their principal, approximately one-third of their total claim;[4] and allocates the entire residue to Columbia in the form of all of the new common stock of the reorganized company. The Alterations reverse the process. They provide for cash payment of the allowable claims of Columbia against Inland, including full post-bankruptcy interest on its secured claims; and allocate the residue for the benefit of Kentucky public creditors in the

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against Inland, which is subordinate to the unsecured claims of the Kentucky public creditors. The only other System claims of Columbia are $629,301 principal amount against American and $2,149,077 against Kentucky (all of which except $60,000 are unsecured); as American and Kentucky are stockholders of Inland, and Columbia's claims against those companies were subordinated, there can be no value for these claims until all creditors of Inland have been paid in full with interest. Throughout we use calculations to August 31, 1959.

[4] A minor amount of pre-bankruptcy interest is included, but all post-bankruptcy interest is excluded; in the case of the Kentucky Bonds, interim cash distributions have been deducted from principal.

form of the new common stock of the reorganized company (A. 25a-27a).

3. Translated into dollars the monetary differences are as follows:

Columbia—In lieu of new common stock judicially valued at $3,020,576 as of December 31, 1957 (A. 20a), Columbia would have received cash estimated at $5,780,664 (A. 26a).

Kentucky Public Creditors—In lieu of cash of $2,466,316 which they are to receive under the Plan, the Kentucky public creditors would have received at their option cash or new common stock of $3,265,160, plus the right to subscribe to $694,650 par value of new common stock (A. 17a, 26a, 28a-29a, 51a-52a).

Despite the Alterations' superior provisions for the two remaining classes of creditors, and although petitioners were supported by other representatives of Kentucky public creditors and by the Securities and Exchange Commission, the District Court summarily rejected the Alterations. Expert testimony tendered by petitioners to support the filing of the Alterations was refused and no other evidence was offered by any other party (A. 62a-63a). The District Judge ruled that " * * * There is no testimony necessary" (A. 63a) and made it plain that he was passing only on the "legal premises" of petitioners' applications (A. 77a-78a).

The District Judge's legal conclusion was that the Kentucky public creditors were barred from filing the Alterations because the Alterations gave them something on account of their unpaid claims for post-bankruptcy interest and that this rendered the Alterations incongruent with the Plan which restricted the Kentucky public creditors to principal only (A. 66a-68a, 77a-78a). He rejected arguments that the general rule disallowing post-bankruptcy interest, embodied in the Plan, was subject to the exception that such interest was payable when the debtor proved "solvent", as was now the case since all other public creditors

had been paid and the Alterations offered to pay Columbia's allowable claims in full with interest on its secured claims. He directed consummation of the Plan although it donates the surplus assets to Columbia, instead of the unpaid Kentucky public creditors, and thus attributes value to Inland's stock before the last of Inland's creditors have been paid in full with interest.

In affirming the District Judge, the majority in the court below relies principally on a restricted view of the purpose and meaning of the statutory provisions governing alterations of confirmed plans; it also extends a blanket, though largely unexplained, endorsement of the District Judge's legal conclusions as to the absence of any rights to post-bankruptcy interest on the part of the Kentucky public creditors. As to the latter point, the views of the District Judge were based on his interpretation of a 1957 opinion written by Judge Miller, then speaking for a divided court, in which Judge Martin concurred and from which Judge Simons dissented. See *In re Inland Gas Corp.*, 241 F. 2d 374, 381, 385. In that opinion, Judge Miller declared that while it is the general rule that "interest * * * ceases to accrue at the start of bankruptcy proceedings * * *" (a rule which he found to be applicable under the conditions of insolvency then existing), one of the well-recognized exceptions to the general rule is that "* * * If the alleged 'bankrupt' proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor * * *". 241 F. 2d at 381. In the present case, Judge Miller (now disagreeing with Judge Martin[5]) finds that the debtor has "* * * become solvent within the meaning of that exception" and that the Kentucky public creditors, "* * * as the only class of creditors remaining * * *" are "* * * entitled to post-bankruptcy interest, insofar as remaining funds are

[5] As Judge Simons, who did not sit on the panel in the present case, voted in favor of awarding post-bankruptcy interest to the Kentucky public creditors regardless of insolvency (241 F. 2d 374), Judge Martin's view here that the "solvency" exception is not available to the public creditors clearly was a minority view in the 1957 opinions.

available to do so, before any surplus reverts to the debtor". Appendix B, *infra*, p. 19c.

In response to the majority's adoption of a narrow view of Section 222 to deny consideration of the merits of the Alterations, Judge Miller shows that the statutory language clearly calls for a broader reading. He also emphasizes that: the appellate court is not "* * * justified in closing our eyes to this available increase in asset value of the debtor corporation * * *"; the changes proposed by Petitioners in the plan are nothing "* * * more than necessary alterations permissible under the statute"; "* * * Columbia, a subordinated creditor, can have no reasonable valid objection to being paid in full in cash"; and the decision of the majority, permitting consummation of a Plan which denies post-bankruptcy interest to the public creditors but accords to Columbia substantially more than is needed to pay in full its allowable subordinated claims (including post-bankruptcy interest on its secured claims), is "* * * directly contrary to the ruling which this Court had previously made and consistently adhered to, that the rights of Columbia are completely and fully subordinated to the claims of all other creditors * * *". Appendix B, *infra*, pp. 14c, 16c, 17c, 18c.

Reasons for Allowance of Writ

The case presents two questions of substantial importance in the administration of the Bankruptcy Act. The first is whether junior interests are entitled to a hearing on the merits of proposals, backed by practical offers of hard money from responsible financial institutions and underwriters, to pay the full amount of all prior claims in cash and thus improve the treatment they receive under a plan which has been confirmed but not consummated. The majority decision below, affirming a summary rejection of the proposal without a hearing, is in conflict with the decision of the Court of Appeals for the Second Circuit in *Knight* v. *Wertheim & Co.*, 158 F. 2d 838. It interprets

provisions essential to the proper functioning of Chapter X of the Bankruptcy Act in a manner contrary to their plain language and in apparent conflict with this Court's views; in particular, it frustrates the Congressional purpose, in adding Section 229 to Chapter X in 1952, to guard against a premature bar of post-confirmation changes often needed in reorganizations to maintain fair and equitable standards.

The second question relates to the so-called "solvency" or "surplus" exception to the general rule disallowing post-bankruptcy interest in insolvency proceedings. Although a surplus now exists within the meaning of the exception, after the full payment of all allowable claims of the debtor, the majority below adheres to an earlier determination in these proceedings, made when the debtor was insolvent, that the sole remaining class of public creditors is not entitled to post-bankruptcy interest. In declining to apply the "solvency" exception in the present financial circumstances, the majority decision is in conflict with the decision of this Court in *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Railway*, 233 U. S. 261, and the express recognition of the "solvency" exception in *City of New York* v. *Saper*, 336 U. S. 328. It is also in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Johnson* v. *Norris*, 190 Fed. 459, and with the declarations on this subject of other federal courts.

Aspects of both questions have been the subject of law review comment.[6]

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[6] See Miller, *Status of Economic Interests in Proceedings Under Chapter X After Confirmation of the Reorganization Plan*, 24 N. Y. U. L. Rev. 707 (1949); Note, *Post-Confirmation Modifications in a Chapter X Reorganization Plan*, 61 Yale L. J. 264 (1952); 64 Harv. L. Rev. 1362 (1951); Note, *Allowance of Interest During Reorganization Proceedings*, 50 Yale L. J. 144 (1940); Note, *Post-Bankruptcy Interest in Chapter X Reorganizations*, 67 Yale L. J. 1131 (1958); Note, *Allowance of Post Petition Interest During Reorganization Proceedings Under Chapter X of the Bankruptcy Act*, 33 N. Y. U. L. Rev. 864 (1958); Laugharn, *Interest Payment After Bankruptcy and to Date of Payment Discussed*, 30

I. The right of junior interests to alter unconsummated plans by paying off senior claims in cash.

A. The conflict between Circuits.

In *Knight* v. *Wertheim & Co.*, 158 F. 2d 838, the Court of Appeals for the Second Circuit held that, despite the prior confirmation of a Chapter X plan, it was incumbent upon the district court to entertain an alteration proposed by stockholders which produced enough cash to pay off unpaid creditors who were to receive securities under the confirmed plan. That court rejected arguments, based on Section 224, that the order of confirmation was "binding" on all parties to the reorganization and not subject to changes materially altering the treatment of affected classes. Writing for the court, Judge Learned Hand stated (158 F. 2d at 842):

> "* * * The order of 'confirmation' is not conclusive, for § 222, 11 U. S. C. A. § 622, expressly provides that the plan may be 'altered or modified' after, as well as before, the plan has been confirmed. If an 'alteration' or a 'modification' does not 'materially and adversely affect the interests of creditors or stockholders', this may be done without further hearing; otherwise, if it does. * * *"

Knight also held that changes in the plan necessary to put in effect the underwriting proposals, upon which the stockholders' alterations were predicated, were not offensive to the statute.

Ref. J. 72 (1956). One of the attorneys for one of the petitioners is a part-time lecturer on Corporate Reorganizations in the Graduate Division of the New York University School of Law, an affiliation to which some of the opposing counsel made reference on an earlier appeal.

See also Address by J. Arnold Pines, *Inland Gas Corporation—An Epic of Corporate Reorganization*, Rutgers University School of Business Administration, February 24, 1960, excerpts from which are set forth in Appendix C, *infra*, pp. 21c-25c.

The decision below is in direct conflict with *Knight*. Here, as in *Knight*, rapidly changing economic conditions made it possible to obtain an underwriting of the common stock of the reorganized company permitting Columbia's claims against Inland to be paid in cash instead of refunded in new shares. The common stock was thereby released for distribution to the public creditors or, if they preferred cash, to the underwriters who agreed to pay cash for the shares. As in the case of the debenture holders in *Knight*, Columbia was tendered full cash payment of its allowable claims, amounting to $5,780,000 and constituting the maximum to which it was entitled, and thus was no longer "affected" by the plan. The public creditors, on the other hand, were guaranteed considerably more than they were offered under the confirmed Plan whether they accepted stock or chose cash. Both classes of creditors were benefitted and neither was prejudiced. In all material respects, therefore, the alterations here and those in *Knight* were identical except for differences arising out of the financial details peculiar to each case. In addition, the alterations here were presented promptly after the confirmation order had become final and before any steps toward consummation had been taken.

Although this Court did not review the merits of the *Knight* decision, it had occasion to consider and recognize the importance of the issue. Because both lower courts in *Knight* had denied a stay of consummation of the confirmed plan, applications for a stay were made in vacation to Mr. Justice Reed. The stay was granted pending applications for certiorari. See *In re Equitable Office Bldg. Corp.*, 72 Sup. Ct. 1086 (In Chambers 1946); also printed in ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 903-909 (2d ed. Wolfson & Kurland 1951). In granting the stay, Mr. Justice Reed declared (72 Sup. Ct. at 1090):

> "I think the stockholders are entitled to have determined the question of power in the district court to grant their petitions, and, if the power exists, the propriety of its exercise under the circum-

stances alleged or the facts that may be developed on a hearing. Widely shifting values make the issues of general importance in pending reorganizations under Chapter X * * *."

In apparent agreement with Mr. Justice Reed as to the importance of the question, and on the suggestion of the S. E. C., the Court took action on the petitions for certiorari which had the effect of keeping the stay alive until the court of appeals had reversed the district court.[7]

While the majority below professes not to be in disagreement with *Knight*, its attempted distinction rests on nothing more than an enumeration of insubstantial differences *in form* between the alterations here and those in *Knight*. In substance and in legal contemplation the cases are identical. In a subsequent opinion, Judge Learned Hand pointed out that in *Knight* the "* * * circumstances peremptorily * * *" demanded that the alteration be entertained "* * * for otherwise the bondholders would have gone off with a large equity, owing to the wholly unexpected appreciation of the property; a result which the whole history of foreclosure forbade. * * *" *Prudence-Bonds Corp.* v. *City Bank Farmers Trust Co.*, 186 F. 2d 525, 528. This is also the crux of the present case. Yet the majority below avoids all discussion of this basic point or of any other matter going to the substance of the alterations. As Judge Miller points out: "The majority opinion gives little, if any, consideration to the fact that the real reason for considering another amendment at the present time is

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[7] The parties obtaining the stay petitioned the Court for certiorari to review (1) the judgment of the district court prior to decision by the court of appeals, and (2) the order of the court of appeals denying a stay. At first, the Court denied so much of the petitions as requested direct review of the judgment of the district court, but held action on the remainder of the petitions in abeyance. *Dana* v. *Duncan*, 329 U. S. 784. It was not until the court of appeals had heard the cases and reversed the district court's rejection of the alterations that the Court denied new petitions to review the correctness of *Knight* and also the remainder of the earlier petitions relating to the stay no longer needed. *McGuire* v. *Equitable Office Building Corp.*, 331 U. S. 818; *Dana* v. *Duncan*, 331 U. S. 819.

that the proposed amended plan makes available for certain creditors approximately $3,500,000 more in cash for the payment of their claims than is available under the present plan. * * * Appendix B, *infra*, p. 14c. Summary rejection of the alterations, for " * * * reasons largely technical * * * " (*ibid.*), enables Columbia to escape with a windfall, over and above its allowable claims, and denies the surplus assets to unpaid public creditors willing to pay off Columbia in full.

B. Allowance of significant post-confirmation changes is essential to the integrity of the reorganization process.

1. If the statute did not permit post-confirmation changes of a material character, plans which unforeseen developments and financial improvements had rendered no longer fair or feasible would nevertheless have to be carried out in contravention of the equitable principles to which reorganization courts are dedicated. The court below, however, espouses principles which would have that precise effect upon the integrity of the reorganization process. It does this by placing its chief reliance on *Diversey Building Corporation* v. *Metropolitan Trust Company*, 141 F. 2d 65 (7 Cir.), and citing with approval a *dictum* [8] in that case as to the interpretation to be given to the alteration provisions in Section 77B(f), 11 U. S. C. § 207(f), the predecessor of 222 in Chapter X. As stated by the majority

[8] The actual decision in *Diversey* was that there was no "jurisdiction" in the District Court to entertain the proposed change. 141 F. 2d at 68. The proceeding in that case had been initiated under Section 77B, a plan had been confirmed *and consummated*, and a *final decree* closing the estate had been entered in 1935. Eight years later, in 1943, the debtor applied in the old proceeding (instead of instituting a new one under Chapter X) to have an amended plan considered because of its inability to carry out all of the terms of the old plan. On the facts, therefore, there is no conceivable resemblance between the problem here and in *Diversey*. In *Knight*, the *Diversey* decision was expressly considered and its holding was deemed not incompatible with a post-confirmation alteration permitting junior interests to pay off senior claims. 158 F. 2d at 842.

below, the alteration provisions were construed in *Diversey* "* * * * to mean that changes and modifications *after the plan is confirmed* refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and does not mean such changes or modifications as will materially alter the property rights established by the decree of confirmation. * * * *" Appendix B, *infra*, p. 10c. In strong criticism of the *Diversey* interpretation, a leading text states: "* * * Such a construction finds no warrant in either § 222 or former § 77B(f) and would, if adopted, freeze the confirmation order into a rigid and unalterable mold." 6 COLLIER, BANKRUPTCY 3900 n. 13 (14th ed., Moore & Oglebay 1947).

Diversey's restricted view of permissible changes in a confirmed plan is based on an erroneous reading of the statute. Under Section 222, the alterations which may be proposed "after confirmation" include those which "materially and adversely affect the interests of creditors or stockholders". The statute also contains explicit instructions as to the procedure to be followed in the event that the alterations are materially adverse. The altered plan is subject to new hearings to consider whether it should be approved, to resubmission to the SEC for examination and report, to renewed voting by affected parties to accept and reject the plan and to new hearings to consider confirmation. If the altered plan has previously been accepted, Section 223 (11 U. S. C. § 623) specifies the mechanics to be used in ascertaining whether the changed plan is also acceptable to those who have already voted. These provisions, designed to safeguard investors whose interests are significantly changed by plan alterations, are completely inconsistent with the suggestion that the statute does not tolerate materially adverse alterations during the post-confirmation stage of unconsummated plans.

2. *Knight* specifically rejected the argument, based on *Diversey*, that post-confirmation changes should be restricted to mechanical details such as "errors, mistakes and omissions" 158 F. 2d 842. This Court also has attributed

to Section 222 the much broader meaning commanded by its plain language. In *Young* v. *Higbee*, 324 U. S. 204, the Court held that preferred stockholders who had appealed from an order confirming a plan, and had subsequently abandoned the appeal by selling their stock for a consideration substantially in excess of its value, were accountable in the Chapter X proceeding for the excess. The effect of the ruling was to increase the participation under the plan of the preferred stockholders as a class and, in response to the argument that the reorganization court could no longer accomplish this equitable result, the Court said (at 214):

> "* * * The District Court still has jurisdiction to exercise its powers under the Act both because of its express reservation and because of the provisions of § 222. * * *"

Section 222 was described as follows (n. 14):

> "This Section gives the judge power, under conditions applicable here, to alter and modify a reorganization plan even after confirmation."

The allocation in *Young* of additional assets to the preferred stockholders because it belonged to them "in equity and good conscience" was plainly not a mechanical change to aid in carrying out the confirmed plan. It was a significant change, comparable to what was proposed here to forestall forfeiture of a sizable surplus which in equity and good conscience belongs to the public creditors and not to Columbia. See also *United States* v. *Knight*, 336 U. S. 505, 508 n. 2.

In railroad reorganization cases under Section 77 (11 U. S. C. § 205), which contains no express provision for post-confirmation alterations, the Court has assumed *arguendo* "that both this Court upon appeal from an order of confirmation in bankruptcy, and the bankruptcy court itself, after its order of confirmation has been affirmed on review * * *, may take cognizance of subsequent changes in conditions and order a plan re-examined by the Inter-

state Commerce Commission. * * * " *Insurance Group* v. *Denver & Rio Grande Western R. Co.*, 329 U. S. 607, 611; see also *R. F. C.* v. *Denver & Rio Grande W. R. Co.*, 328 U. S. 495, 521-2. While the railroad reorganization cases are not decisive of the issue in this case,[9] note may be taken of the Court's indication in *Insurance Group* that re-examination would be supportable if a reasonable showing were made that under the plan senior creditors were receiving " * * * more in value than the face of their claims * * * " 329 U. S. at 618. Such a showing has been made here as to Columbia's excessive participation.

The need for the alterations thus seems self-evident and a plausible explanation for the devastating blow which public creditors are dealt by the decision below is difficult to find. Perhaps the majority was influenced by the fact—to which its opinion adverts—that one of the petitioners, Paul E. Kern, "was not an original investor in the Kentucky bonds and debentures * * * ". But neither was Columbia, which purchased its bonds and debentures at depressed prices after the Debtors had experienced financial difficulties, largely as a result of Columbia's unlawful effort to stifle the competition they were giving Columbia. See *In re American Fuel & Power Co.*, 122 F. 2d 223; *Columbia Gas & Electric Corp.* v. *United States*, 151 F. 2d 461; *In re Inland Gas Corp.*, 187 F. 2d 813. Columbia's purchases were made pursuant to a scheme to destroy the Debtors and injure their public security holders and it was Columbia, which improperly initiated the judicial proceedings to which the Debtors have since been subject. *Ibid.* As to Kern,

[9] In all such railroad reorganization cases considered on the merits—some of which were cited below by respondents—the Court was satisfied that the earnings or other factors urged by the excluded classes as warranting re-examination had been envisaged and considered by the I. C. C. in the valuation it reached. Here there is no similar attempt to reopen an issue of valuation previously adjudicated. The effort here is to take advantage of the higher values which responsible underwriters are now placing on the assets and supporting with cash proposals not previously available.

there was no bar to his purchases; on the contrary, it has been stressed that former holders of a debtor's securities would be seriously prejudiced if they could not dispose of their holdings in a free market during reorganization. To characterize Kern a "speculator"—though he has been an owner of Kentucky debt securities for some twenty-two years—and to allow this to play any part in reaching a decision prejudicial to public creditors as a class and beneficial to Columbia—an adjudicated wrongdoer—is extraordinary indeed. What the Court said in *Young* in a similar context seems especially appropriate (324 U. S. at 214):

> "Nor can we sustain the contention that relief should be denied on the allegations that Young's motive in bringing the proceeding is an unworthy one. His petition sought relief for the benefit of all the stockholders. The rights of these stockholders are not to be ignored because of some motive attributable to Young."

3. The majority below cites *Country Life Apartments v. Buckley*, 145 F. 2d 935, a decision of the Second Circuit which preceded *Knight*. In *Country Life*, the existing plan provided for a sale of the debtor's assets and a distribution of the proceeds among affected creditors. The proposed "modification", which was not based on any new financial developments since promulgation of the earlier plan and which could easily have been submitted as an alternate plan at earlier hearings, provided for an internal reorganization in which new securities would be issued in exchange for old claims. The modification, which the lower court had in any event found to be not fair and not feasible, was said to come too late under the circumstances existing in *Country Life*. That decision, however, was distinguished in *Knight* so as not to preclude post-confirmation changes necessary to put into effect a newly-available underwriting reflecting financial improvements occurring subsequent to preparation of the confirmed plan.

In distinguishing *Country Life*, Judge Learned Hand conceded in *Knight* that the alterations should be "to some

extent congruent with the plan" (158 F. 2d at 842). But he hastened to add: "* * * We cannot, however, agree that there are narrower or more definite limits than this. * * *" (*ibid.*); and in a later case he reiterated that the line of demarcation between permissible and non-permissible changes "is necessarily left at large". See *Prudence-Bonds Corp. v. City Bank Farmers Trust Co.*, 186 F. 2d at 528. It is quite evident that the statute embodies no restrictions and that these remarks were necessitated solely by the prior existence in that Circuit of *Country Life*. Realistically, *Knight* constituted a policy departure from *Country Life* in belated recognition of the need for greater flexibility to meet unanticipated developments. What the majority below derives from *Country Life* and the other opinions from which it quotes are labels such as "new" and "completely different" which it seeks to apply to the alterations here, in utter disregard of their substance or merits, for the purpose of justifying their summary rejection. Moreover, the terms are used in the context of the majority's expressed belief that only mechanical changes are permissible once confirmation has occurred, so that all material alterations, whether or not adverse,[10] are deemed to be "radical" departures from the confirmed plan. The fact is that if the alterations presented in this case constitute a "new" and "completely different" plan, this was no less true in *Knight*. The net result below is that an exercise in semantics is allowed to control the decision, the effect of which is to forfeit to a faithless parent the surplus assets which in equity belong to unpaid public creditors.

C. Congress emphasized the importance of post-confirmation alterations in its 1952 amendments to the statute.

The decision below subverts the Congressional policy, as expressed in 1952 amendments to Chapter X, to allow

[10] Judge Miller points out that the alterations in this case—which pay cash to Columbia instead of stock and give the stock to the Kentucky public creditors—are not *adverse* to the interests of either class. Appendix B, *infra*, p. 18c.

post-confirmation alterations of a materially adverse character. As construed in *Knight*, the statute permitted materially adverse alterations to be made at any time prior to entry of a final decree, even though the plan had already been consummated, subject only to a judicial discretion to refuse amendments which had been too long delayed. 158 F. 2d at 842, 843. In some quarters, there was still preference for confirmation, or a time reasonably close to confirmation, as a cut-off date and it was contended that the *Knight* construction created " * * * uncertainty as to the point in the reorganization proceeding at which rights vest under the plan sufficiently to make it equitable * * * to cut off further right to amend or modify the plan as to matters materially and adversely affecting the rights of creditors or stockholders by the ordinary procedure for the amendment of a plan under section 222". H. R. Rep. No. 424, 81st Cong., 1st Sess. 17 (1949). In view of the importance attached to the problem, it was brought to the attention of the Congress for a policy decision. H. R. 3111, introduced in the 81st Congress, proposed amendments to Chapter X requiring the judge to fix in the order of confirmation the date when the trustee would cease to operate the business and prohibiting materially adverse alterations after that date. These legislative proposals were opposed by the SEC as an undesirable infringement upon the flexibility afforded by Section 222 to take into account changing economic conditions which might require revision of earlier determinations that a plan was fair and feasible.

The objections of the SEC were subsequently composed by developing a new section, § 229 (11 U. S. C. § 629), specifying concrete tests for determining whether a plan has been "substantially consummated" and permitting materially adverse amendments until such consummation has occurred. See H. Rep. No. 2320, 82d Cong. 2d Sess. 2, 16-17 (1952). This proposal was enacted into law. 66 Stat. 431 (1952). See Appendix A, *infra*, p. 3.

The majority opinion below shows no recognition that in adopting this amendment Congress re-emphasized its

purpose, originally expressed in Section 222 (11 U. S. C. § 622) but now codified in unmistakable terms, to insure that the right to propose materially adverse alterations survives confirmation of the plan. The new section plainly wrote an end to any lingering contention, such as the majority below seeks to perpetuate, that the statute does not allow "such changes or modifications as will materially alter the property rights established by the decree of confirmation". Appendix B, *infra*, p. 10c. It also substituted a definitive statutory bar date—after which (but not before) no materially adverse alterations may be entertained—in lieu of the uncertainty of relying upon judicial discretion to decide whether the proposal should be refused consideration because of delay in presentation. And it rendered obsolete such prior decisions as *Diversey* and *Prudence-Bonds*—cited by the majority below—in both of which the alterations were presented many years after the plans had been completely consummated.

Conversely, the delay which occurred in these proceedings before the present plan was promulgated and *prior* to confirmation—so strongly stressed below—has no bearing on the timeliness of the proposed alterations. Judge Miller shows that the delay has been beneficial to parties in interest and points out that the court below heretofore "* * * consistently recognized that the equitable treatment of creditors under materially improved financial conditions fully justified additional delay in bringing the proceeding to a conclusion" and that there is "* * * no reason why we should now reject that prineiple if materially changed conditions again warrant a further delay." Appendix B, *infra*, pp. 13c, 14c. The delay has been especially advantageous to Columbia. Prior to 1957, the court below and Columbia accepted the fact that because of Columbia's subordination it would receive no participation in the assets and earlier plans omitted Columbia entirely. The alterations now offer Columbia $5,780,000 in cash.

The present delay, in any event, arises because of Columbia's unwillingness to accept this full cash payment

of its allowable claims. It has been Columbia's maneuver to refuse the payment and simultaneously to complain that the stock underwriting which would have produced the cash has lapsed with the passage of time. Similar tactics by the debenture holders in *Knight* received no encouragement from Mr. Justice Reed (72 Sup. Ct. at 1090) or Judge Learned Hand (158 F. 2d at 842). "* * * It is indeed true", said Judge Hand, "that the offer * * * has long since lapsed, and that at present there is no outstanding offer; but it does not follow that a new offer may not be made of enough cash to pay off the debentures. * * * "

The lower court's challenge to the general Congressional policy, and to the specific legislative purpose in Section 229 to codify the *Knight* holding that confirmation is not a bar to materially adverse changes, warrants review by the Court to resolve the issue.

II. The change from "insolvency" to "solvency" during the pendency of a plan demands revisions to comply with fair and equitable standards.

Inland's emergence from insolvency, as demonstrated by the new financing proposals made possible by economic improvements since the Plan was promulgated, brought into play rules of distribution demanding revision of the existing plan provisions. It has been held, as a general rule, that post-bankruptcy interest will not be allowed to unsecured creditors of an insolvent debtor; this general rule was applied to the Kentucky public creditors at a time when Inland was admittedly insolvent and unable to pay the principal of all of its outstanding claims. *In re Inland Gas Corporation*, 241 F. 2d 374, 381. As was true in the cited opinion, all statements of the general rule have usually been accompanied by the declaration that "There are two well-recognized exceptions to this general rule", the first of which is that "If the alleged 'bankrupt' proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor * * * " 241 F. 2d at 381.

In *City of New York* v. *Saper*, 336 U. S. 328, the Court's last pronouncement on post-bankruptcy interest, the general rule ("a fundamental principle of the English bankruptcy system which we copied") was applied to tax claims. Mr. Justice Jackson noted, however, that in England the "solvency" or "surplus" exception had been recognized [11] and was one of the " * * * exceptions carried over into our system", citing *American Iron Co.* v. *Seaboard Air Line*, 233 U. S. 261, 267. In *Seaboard*, an equity receivership proceeding in which the assets were returned to the debtor upon its undertaking to discharge unpaid claims, it was argued that the creditor was not entitled to interest during the receivership. In ruling that interest was payable, the Court said (233 U. S. at 266):

> " * * * as a general rule, after property of an insolvent is in *custodia legis* interest thereafter accruing is not allowed on debts payable out of the fund realized by a sale of the property. But that is not because the claims had lost their interest-bearing quality during that period, but is a necessary and enforced rule of distribution, due to the fact that in case of receivership the assets are generally insufficient to pay debts in full. * * * in case funds are not sufficient to pay claims of equal dignity, the distribution is made only on the basis of the principal of the debt. But that rule did not prevent the running of interest during the Receivership; and if as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid. * * * "[12]

Citing *Johnson* v. *Norris*, 190 Fed. 459 (5 Cir.), a leading bankruptcy case in this area, the Court declared

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[11] Citing *Bromley* v. *Goodere*, 1 Atk. 75; *Ex parte Mills*, 2 Ves. Jr. 295; and *Ex parte Clarke*, 4 Ves. Jr. 676. 336 U. S. at 330 n. 7. See also 2 *Blackstone, Commentaries* * 488.

[12] In *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 413, involving the rights of secured creditors in a national bank receivership, the Court also declared that " * * * the obligation to pay interest is not destroyed by the insolvency * * * ".

that the rule was the same in bankruptcy so "that creditors were entitled to interest accruing after adjudication" in the "rare instances where the assets ultimately proved sufficient for the purpose" (233 U. S. at 266-7). Since *Saper*, the "solvency" or "surplus" exception has either been recognized or applied in *Littleton* v. *Kincaid*, 179 F. 2d 848, 852 (4 Cir.); *United States* v. *Harrigton*, 269 F. 2d 719, 720, 722 (4 Cir.); *United States* v. *Bass*, 271 F. 2d 129, 130 (9 Cir.); *In re F. P. Newport Corp.*, 123 F. Supp. 95 (S. D. Cal.), appeal dismissed, 216 F. 2d 344 (9 Cir.); *Marcalus Manufacturing Co.* v. *United States*, 169 F. Supp. 821 (Ct. Cl.).

As the normal situation is one justifying the stoppage of interest at the initiation of the proceeding, the exception presupposes subsequent developments, whether through "good fortune or good management", which warrant alteration in the rule of distribution. In the context of corporate reorganizations, the improvement in financial conditions creating a surplus often occurs during the course of the proceedings and may appear after confirmation of a plan. Unless rights have vested in persons not parties to the proceedings, which under Chapter X can not occur earlier than "substantial consummation" (§ 229), the surplus assets must be allocated to those equitably entitled to them. Whether this is done through an alteration or modification complying with § 222, or by any other equitable method, seems immaterial since the power and duty of the reorganization court to give effect to the exception are undoubted.

The majority below fails to give vitality to the exception simply because it had occasion earlier, in circumstances of insolvency, to hold that the general rule was then applicable. Since the alterations tendered to Columbia full cash payment of $5,780,000 (of which the greater portion, $3,637,000, represents post-bankruptcy interest on secured claims), the consequence of the decision is to divert the surplus above this amount to Columbia even though the claims of public creditors for $5,200,000 of post-bankruptcy

interest remain completely unpaid. Columbia thereby not only participates to the extent of post-bankruptcy interest on its unsecured claim (even though under the law of the case this claim is subordinate to the claims of public creditors), but also on account of claims it holds against other companies in the System which, as stockholders of Inland, are entitled to no assets until all of Inland's creditors (including the public creditors) have been paid in full with interest. This allocation of the surplus is incompatible with the design of the "solvency" exception to guard against inequitable reversions to a debtor's stockholders and is in conflict with the applicable decisions of this Court and other courts of appeal.

Admittedly there exist *dicta* casting doubt on the availability of exceptions to the general rule disallowing post-bankruptcy interest. In *Sword Line v. Industrial Commissioner of New York*, 212 F. 2d 865, 869, Judge Clark, writing for a divided court, commented that "• • • the Supreme Court has not yet settled the extent and nature of these suggested exceptions • • • " and "• • • in pursuance of an overriding policy the Court may ultimately think it not desirable to allow any at all • • • ". Recently it has been questioned whether an exception allowing post-bankruptcy interest to a secured creditor when the proceeds of his security are ample for that purpose—frequently referred to in the cases as "the third exception"—should be recognized since Saper noted only two exceptions. *United States* v. *Harrington*, 269 F. 2d 719, 723.[13] The Ninth Circuit

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[13] The Referee's decision reviewed in *Harrington*, "disallowing United States tax claims for post-bankruptcy interest and penalties in which notices of lien were filed before bankruptcy", was printed in the Journal of the National Association of Referees in Bankruptcy [33 Ref. J. 12 (1959)], which subsequently commented that the publication "has resulted in bringing into focus *a distressing conflict of decisions and opinion as to what the law is which urgently requires resolution, either by an authoritative opinion of the United States Supreme Court or by the enactment of legislation by Congress.*" (emphasis added). 33 Ref. J. 34 (1959).

—which has ruled both against and for the third exception (Cf. *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10, 14, with *Palo Alto Mutual Savings & Loan Ass'n* v. *Williams*, 245 F. 2d 77)—recently stated that it would continue to recognize the third exception "until Congress or the Supreme Court declares otherwise". *United States* v. *Bass*, 271 F. 2d 129, 130-131. This issue is of importance here since both the Plan and the Alterations award in excess of $3,637,000 to Columbia as post-bankruptcy interest on secured claims on the assumption that the third exception is valid.

The exceptions to the post-bankruptcy interest rule, being of practical and recurring importance, are continuously occupying the attention of the lower federal courts. A definitive ruling by this Court on the availability and scope of the exceptions would be of far-reaching significance in the bankruptcy field.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1960.

APPENDIX A

The following provisions of Chapter X of the Bankruptcy Act (52 Stat. 883, 11 U. S. C. §§ 501 *et seq.*) are pertinent to the questions presented by this petition.

SECTION 222 (11 U. S. C. § 622). A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SECTION 223 (11 U. S. C. § 623). Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SECTION 224 (11 U. S. C. § 624).

Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors

and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession and are not contingent, unliquidated or disputed.

* * *

SECTION 226 (11 U. S. C. § 626). The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order

confirming the plan or in the order directing or authorizing the transfer or retention of such property.

* * *

SECTION 229 (11 U. S. C. § 629).

a. A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 224 of this Act.

b. Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision a of this section.

c. When a plan has been substantially consummated as defined in subdivision a of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

APPENDIX B

Opinions and Order of Court of Appeals

In the Matters of:

INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
AMERICAN FUEL & POWER COMPANY,

Debtors.

Appeal from the United States District Court for the Eastern District of Kentucky.

Nos. 13,911; 13,955

Decided January 27, 1960.

Before: MARTIN, MILLER and CECIL, Circuit Judges.

MARTIN, Circuit Judge. We would need go to fiction rather than to the case books to find an appropriate parallel to this prolonged litigation. See *Jarndyce* v. *Jarndyce*, reported in "Bleak House" by Charles Dickens. The controvery presented by the present appeals evolves from an equity receivership instituted in late 1930, followed by proceedings under section 77(b) of the Bankruptcy Act and finally by corporate reorganization proceedings under *Chapter X* of the Bankruptcy Act. The two separate appeals which bring the case to us again at this late date are from an order entered by the United States District Court confirming a plan of reorganization.

Appendix B—Majority Opinion of Court of Appeals

For an understanding of the history and background of the case in all phases, we refer to our previous decisions, as follows: *In re Inland Gas Corporation et al.* [*Columbia Gas* v. *Lockhart et al.*] (1937), 91 F. (2d) 113 (C. A. 6); *In re Inland Gas Corporation, Piney Oil & Gas,* and *Hamilton Gas Co.* (1939), 102 F. (2d) 131 (C. A. 6); *In re American Fuel & Power Co.* (1941), 122 F. (2d) 223 (C. A. 6); *Columbia Gas & Electric Corporation* v. *United States* (1945), 151 F. (2d) 461 (C. A. 6); *Columbia Gas & Electric Corporation* v. *United States* (1946), 153 F. (2d) 101 (C. A. 6); *In re Inland Gas Corporation* (1951), 187 F. (2d) 813 (C. A. 6); *In re Inland Gas Corporation* (1953), 208 F. (2d) 13 (C. A. 6); *In re Inland Gas Corporation* (1954), 211 F. (2) 381 (C. A. 6); *In re Inland Gas Corporation* (1954), 217 F. (2d) 207 (C. A. 6); *In re Inland Gas Corporation* (1957), 241 F. (2d) 374 (C. A. 6); *In re Inland Gas Corporation* (1959), 262 F. (2d) 510 (C. A. 6). The first two above listed opinions have no relevancy now.

Our opinion reported at 151 F. (2d) 461 (1945) discloses the historical background; and our last two opinions, entitled "In re Inland Gas Corporation", reported respectively at 241 F. (2d) 374 (1957) and at 262 F. (2d) 510 (1959) relate to, and we think control, the issues directly presented by the present appeals.

At the conclusion of our latest opinion (decided January 15, 1959), reported at 262 F. (2d) 510, certiorari denied April 27, 1959, 359 U. S. 979, we stated that United States District Judge Ford had appropriately applied our adjudication set out in 241 F. (2d) 374, with respect to post-bankruptcy interest and to all other issues before him. The appeals were accordingly dismissed and the judgment of the district court, confirming the plan of reorganization, was affirmed. In that portion of our opinion written by Judge Miller, in which the writer concurred, we held directly that post-bankruptcy interest should not be allowed

the public holders of bonds and debentures of the Kentucky Gas and Fuel Corporation.

In proceedings in the United States District Court following remand, Paul Kern filed what he called "Alterations and Modifications" of the Plan of Reorganization which had been confirmed. Kern was not an original investor in the Kentucky bonds and debentures but began buying them in 1941 and continued to increase his holdings until he owned thirty-four percent of the outstanding issue of bonds and debentures. Throughout these lengthy proceedings, this speculator has filed six appeals from the district court's orders and judgments. At the conclusion of the hearing, the district judge announced his denial and rejection of the proposed petition for alterations and modifications and granted the petition of the Inland Gas Corporation for an order consummating the plan. The present appeals are from that order, which was entered on June 1, 1959.

We are of opinion that the United States District Court correctly and faithfully followed the mandate of this court. A comparison of the proposed alterations and modifications of the Plan of Reorganization with the Plan, which we have heretofore affirmed, clearly reveals that the alterations and modifications under consideration are not merely such, but in totality constitute an altogether new and different proposed plan of reorganization.

At the outset, the so-termed "Alterations and Modifications" entirely eliminate Article I, which discloses the directions of the district court to the Trustee as to the method of drawing the plan and states the principles upon which the reorganization is grounded. Indeed, nothing appears to be left of the confirmed Plan, except the partial description of the reorganization and history of the debtor. Many changes demonstrate that an entirely new plan is presented under the guise of "Alterations and

Modifications." Notation should be made of the following important changes:

(1) The alteration suggested by Kern would forbid the Trustee of Inland Gas Corporation from paying claims and reorganization expenses and fees, and would impel the transfer of all physical properties and cash to the reorganized corporation which would assume the obligation of making such payments;

(2) Article *V* of the confirmed plan has eliminated therefrom the reorganization value of $10,538,800 upon which the plan is predicated;

(3) The classification of the creditors as set forth in Article *VI* is so changed that the public creditors of Kentucky, rather than those of Columbia, would receive all stock of the reorganized corporation;

(4) The capitalization of the reorganized corporation is completely changed from 500,000 authorized shares of common stock and a short-term unsecured bank loan not to exceed $4,000,000 to a wholly different capital structure. The proposed complex capital structure consists of $2,530,000 of Series "A" five-and-one-half percent bonds, due October 1, 1971; $470,000 of Series "B" five-and-one-half percent convertible bonds, due October 1, 1971; a $1,250,000 Series "C" five percent first mortgage note, due October 1, 1962; and new stock of the reorganized corporation to be issued in the amount of $4,765,160 par value.

The three above-listed series of new bonds and the mortgage note would be secured by a first-mortgage on all the debtor's properties and, presumably, would be purchased by the insurance companies and the banks named in the so-called "Alterations". New stock of the par value $3,265,160 would be issued to public holders of Kentucky bonds and debentures. There would be offered

for sale on subscription rights to public holders of Kentucky bonds and debentures $694,650 par value of the new stock and $805,350 par value of that stock would presumably be sold to underwriters Dempsey & Company and Byllesby & Company who proposed, subject to specified conditions, to purchase at par all the new common stock which Kentucky creditors receive and desire to sell and all the new stock which Kentucky creditors would be entitled to purchase under the right to subscribe but did not desire to purchase;

(5) The proceeds from the sale of bonds and new stock, together with the cash balances of the Trustee, would be used to pay reorganization fees and other expenses and certain priority claims; to pay the American Fuel & Power Company notes with post-bankruptcy interest; to pay the secured claims of Columbia against Inland Gas Corporation, with post-bankruptcy interest; and to pay the unsecured claims of Columbia against Inland Gas Corporation without post-bankruptcy interest;

(6) Finally, the so-called "Alterations and Modifications" provide further that two insurance companies and a banking institution would supply the debt financing for which Kidder, Peabody and Company would be paid a fee of $45,000 for services. All the financing proposals, however, were made subject to contingencies. For example, the Home Life Insurance Company proposal letter states that the proposed financing by Kidder, Peabody and Company is in principle satisfactory to it, but that any binding commitment on its part would be subject to execution of a purchase agreement and indenture satisfactory to it and to its counsel. Moreover, the commitment of Dempsey & Company and Byllesby & Company to purchase at par all stock of the reorganized corporation which the public holders of Kentucky securities desired to sell or for which

they refused to subscribe is hedged with a time limitation of August 31, 1959, which has already expired.

The statute with which the appellants contend the district court failed to comply is section 222 of the Bankruptcy Act [11 U. S. C. A. 622], 52 Stat. 898: "A plan may be altered or modified, *with the approval of the judge*, after its submission for acceptance and before or after its confirmation if, *in the opinion of the judge*, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, *filed with his approval*, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in Article [subchapter] *VII* of this chapter in regard to the plan proposed to be altered or modified, shall be complied with." [Italics added.]

Judge Ford stated that, had he sustained the position assumed by appellants and permitted the filing of their alterations or modifications, we would be "starting fresh, turning around and going back on another theory." We think the district judge did not abuse the discretion expressly granted him by the statute; but, on the contrary, we consider that he used sound common-sense, practical judgment in declining to permit an altogether new plan to be submitted, under the guise of alterations and modifications, in lieu of a sound plan already confirmed by him and approved by this appellate court, with certiorari denied by the Supreme Court of the United States.

In *Diversey Building Corporation* v. *Metropolitan Trust Co.*, 141 F. (2d) 65 (C. A. 7), the United States Court of

Appeals for the Seventh Circuit affirmed the district court, stating its belief to be that the Congress did not intend that a debtor corporation should be permitted to ask for a radical change of a plan of reorganization after the plan had been confirmed and was being executed under the supervision of the court. The subsection of the statute providing that changes and modifications may be proposed before or after the consummation of a plan of reorganization must be construed, the court asserted, with other pertinent subsections in order to understand the congressional intent. The subsection was interpreted to mean that changes and modifications *after the plan is confirmed* refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and does not mean such changes or modifications as will materially alter the property rights established by the decree of confirmation. In no event, the court added, should any change be made without the consent of the court. The fact that the *Diversey* case was decided under section 77 (b) of the Bankruptcy Act does not affect applicability of its principles to the situation confronting us here.

Country Life Apartments v. *Buckley*, 145 F. (2d) 935 937 (C. A. 2), was a case of reorganization under Chapter X. There, the district court found that, at a confirmation hearing, the proposed amendments constituted a new plan and, for that reason, the court refused to permit such amendments to be filed. This judgment was affirmed on appeal. Judge Clark said: "Appellants' proposals filed by way of objections, however, differed so greatly from the trustee's plan that they could not possibly be treated as a mere modification. * * * Upon ascertaining this fact, the District Court was not required to listen to further arguments on the merits of the proposals, and hence committed no error in denying appellants further opportunity to be heard."

Knight v. *Wertheim*, 158 F. (2d) 838 (C. A. 2), is regarded by appellants as strong authority in their behalf. We do not agree with their argument for, in that case, Judge Learned Hand said that the proposed changes were not so radical as to fall within the ambit of the court's previous decision in the *Country Life Apartments* v. *Buckley* case. Comparison of the facts of the *Knight* case with those in this litigation will show the cases to be plainly differentiable.

Moreover, in *Prudence Bonds Corporation* v. *City Bank Farmers Trust Co.*, 186 F. (2d) 525, 528 (C. A. 2), Judge Hand impressively said: "* * * the Court may never under the guise of 'alteration' or 'modification' substitute an entirely new 'plan' in place of the original: although what is a line between a substitute and an 'alteration' or a 'modification' is necessarily left at large. * * * The question is one of discretion, though of a discretion which should be sparingly exercised, * * * unless the circumstances peremptorily demand it. * * * We cannot deny that the view which we now take may lead to abuse; it is often exceedingly difficult for a bankruptcy court to resist the importunities, usually unopposed, of those who wish to keep the 'revived debtor' indefinitely beneath its aegis; and our review of a discretion, which we may think to have been unwisely exercised, is not a very effective remedy. We can do no more than declare, for whatever weight it may have, that we deem the long delay which so often occurs between the order of 'confirmation' and the 'final order' a major abuse, and that a judge who superintends such a proceeding should feel himself charged with an affirmative duty to insist upon its early conclusion."

The contrast of the simple alteration approved in *Knight* v. *Wertheim*, *supra*, with the alterations and modifications proposed here is most striking. It would seem that any careful analysis of the plan which has been confirmed with the result reached should the alterations and

modifications of Kern be adopted clearly demonstrates that his offering constitutes actually a completely new and altogether different plan.

The confirmed plan embraces a statement of principles derived from directives of the district court and the decisions of that court denying post-bankruptcy interest to the public creditors of Kentucky Fuel Gas Corporation, while the proposed alterations eliminate those principles and award post-bankruptcy interest to the public creditors of that corporation. The plan is based upon a judicially determined valuation, while the alteration is not predicated upon any definitive valuation of Inland.

The plan calls for a simple capitalization of common stock and an unsecured bank loan: the alteration provides for a complicated capitalization of common stock and the issuance of three series of bonds and a mortgage note, all secured by a first mortgage on all the properties of the reorganized corporation. Under the confirmed plan, the capitalization of the reorganized corporation is assured by an unequivocal offer from a lender, while the finances proposed by the alterations and modifications is subject to several contingencies; and the underwriting offer to purchase stock of the reorganized corporation has already expired by prescribed time limitation. The plan provides for payment in cash of the principal amount of the claims of Kentucky creditors and the issuance of stock to Columbia: the alteration would require the payment of certain claims of Columbia in cash and the issuance to public creditors of Kentucky of stock for their claims. The plan calls for payment of claims and reorganization fees and expenses by the Trustee for Inland Gas Corporation, while the alteration proposes that these be paid by the reorganized corporation.

District Judge Ford aptly stated that section 222 authorizes modification, but does not authorize "stopping in the middle of a stream and starting a new plan with all

of its problems afresh." We think that he wisely said, also, that the two plans "are not kin in any respect in their major problems", being incongruous rather than congruous.

The appellees are correct in their assertion that the proposed "alterations and modifications" constitute an attempt to relitigate matters previously decided by this court and that the district judge did not abuse his discretion in denying them consideration.

In concluding what we hope will be our last words concerning this protracted litigation, we cannot refrain from commending the able, experienced and conscientious district judge, Honorable H. Church Ford, for his patient consideration throughout these many years of the trying and often complicated issues which have been presented to him for determination. We think that he has displayed wisdom in bringing this reorganization case, at "long last", to a successful conclusion, and deserves to rest upon his hard-earned laurels.

The judgment of the district court from which the appeals have been taken is affirmed.

MILLER, Circuit Judge, dissenting. I fully realize the prolonged period of time during which this reorganization has been in litigation and the sincere desire of those interested in it that it be brought to a conclusion. But, as the numerous appeals to this Court, referred to in the majority opinion, will show, the operation of the debtor corporation by the Trustee has been most successful over such period of years, with the most unusual result that successive delays have been necessary in order that proposed plans of reorganization could be amended or a new plan submitted so as to properly reflect for the benefit of creditors the materially improving financial and economic condition of the debtor under the management of the Trustee. Our previous treatment of this proceeding clearly shows that we have consistently recognized that the equitable

treatment of creditors under materially improved financial conditions fully justified additional delay in bringing the proceeding to a conclusion. It is against this background that we must consider the present appeals. I see no reason why we should now reject that principle if materially changed conditions again warrant a further delay.

The majority opinion gives little, if any, consideration to the fact that the real reason for considering another amendment at the present time is that the proposed amended Plan makes available for certain creditors approximately $3,500,000.00 more in cash for the payment of their claims than is available under the present plan. The proper and equitable distribution of this additional money is not provided for by the present Plan. Courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240. I do not believe that, based on reasons largely technical and on the fact that this reorganization has lasted for an unusually long time, we are justified in closing our eyes to this available increase in asset value of the debtor corporation, and in failing to allocate it among the creditors in some orderly and equitable manner.

The present situation is the result of the following developments. The plan which has been approved and confirmed, but not consummated, was proposed in February, 1958, on the basis of the financial conditions prevailing as of December 31, 1957. Subsequent to confirmation by this Court on January 15, 1959 (262 F. (2) 510) and denial of certiorari by the Supreme Court on April 27, 1959 (359 U. S. 979), responsible bankers and underwriters interested in reorganizing the debtor made commitments for debt financings and stock underwritings aggregating more than $9,000,000.00, the effect of which was to produce for reorganization purposes approximately $3,500,000.00 more in cash than is provided by the present Plan. These com-

mitments recognized and gave effect to a materially improved financial condition of the debtor corporation. It is true that this original commitment was subject to a time limitation of August 31, 1959. But, by a written letter of August 28, 1959, the date of October 31, 1959, was substituted for August 31, 1959, together with the statement that it was realized that further extensions might be necessary and it was the present intention, assuming no substantial change in general market conditions, to make any necessary extensions, although there was no commitment to do so. The proposed changes in the Plan give effect to this increased value of the assets of the debtor corporation.

For our present purposes it is sufficient to briefly summarize the difference between the treatment of creditors under the present Plan and the proposed treatment under the amended Plan in view of the increased asset value of the debtor corporation. Both the present Plan and the proposed amended Plan deal mainly with the rights and priorities of three classes of creditors, (1) American Fuel public creditors, (2) Kentucky Fuel public creditors, and (3) Columbia Gas. Both Plans provide for the payment in full in cash of the American public creditors in the approximate amount of $4,900,000.00, and, by agreement of the parties, these creditors have been paid. The issue involved is accordingly the treatment to be received by, and the allocation of assets between Kentucky public creditors and Columbia Gas. This Court has heretofore adjudicated the priorities between these creditors. The claim of Columbia Gas is subordinated to the claims of all other creditors. *Columbia Gas & Electric Corp.* v. *United States*, 151 F. (2) 461, C. A. 6th, modification denied, 153 F. (2) 101, C. A. 6th, cert. denied, 329 U. S. 737; *In re Inland Gas Corporation*, 241 F. (2) 374, 381-382, C. A. 6th. After the payment of the principal of the claims of Kentucky

public creditors, but without post-bankruptcy interest, Columbia is entitled to the payment of its claim, without post-bankruptcy interest on the unsecured portion thereof. *In re Inland Gas Corporation,* supra, 241 F. (2) 374, 382, C. A. 6th. This is now the law of the case.

The present Plan was based upon this law of the case. After payment of the principal of the claims of Kentucky public creditors in the amount of $2,466,316.00, the Plan allocates to Columbia all of the new common stock of the reorganized company, valued at $3,021,576.00, which is less than the principal amount of its claim with interest on the secured portion thereof, totaling $5,780,664.00. If this valuation had remained constant, the Plan would be fair and equitable.

But, the new financing commitments of 1959 recognized materially increased value of the common stock of the reorganized company, with the probable result that Columbia would receive through the common stock allocated to it more than $5,780,664.00, which is the total amount of its subordinated claim, while Kentucky public creditors, to which Columbia is subordinated, would only receive the principal of their claims without post-bankruptcy interest. This is directly contrary to the ruling which this Court had previously made and consistently adhered to, that the rights of Columbia are completely and fully subordinated to the claims of all other creditors (151 F. (2) 461; 153 F. (2) 101; 241 F. (2) 374, 381-382). Considering what this Court said in 151 F. (2) 461 about the conduct of Columbia in causing the financial collapse of the debtor corporation, I am unable to see how, at the present time, we can judicially approve the consummation of a plan which, in effect, will pay post-bankruptcy interest in part on the unsecured claim of Columbia and at the same time deny any post-bankruptcy interest on the claims of the Kentucky public creditors unless such result is now required by the applicable statutory provisions.

The proposed alterations prevent this result. The additional cash now available will be used to pay off in full in cash the total claim of Columbia in the amount of $5,780,664.00. Certainly, Columbia, a subordinated creditor, can have no reasonable valid objection to being paid in full in cash. The Kentucky public creditors will receive in lieu of the cash payment of $2,466,316.00 provided by the present Plan, new common stock of the par value of $3,265,160.00, plus the right to subscribe to $694,650.00 par value of new common stock. The underwriting commitment makes it possible for any Kentucky public creditor who prefers cash to sell the stock issued to him at its par value to the underwriters.

It will thus be seen that the proposed amended Plan will not only pay Columbia in full and at the same time keep it in its subordinated position to Kentucky public creditors, but will result in substantial increased payments to the Kentucky public creditors over what they would receive under the present Plan. This appears to me to be the proper equitable result and one which should be made effective unless we are barred from doing so by the applicable statutory provisions.

There is no legal bar to the alteration of the Plan at the present time, even though it has been confirmed. *Sec. 222 of the Bankruptcy Act, Sec. 622, Title 11, U. S. Code* provides that a plan may be altered or modified, with the approval of the judge, after its confirmation "if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders." The majority opinion points out numerous differences between the present Plan and the proposed amended Plan, taking the position that the proposed changes constitute more than an alteration or modification. But, the statutory test is not the difference in form, but whether the alteration materially and adversely affects the interests of creditors or stockholders.

Appendix B—Dissenting Opinion

The essential difference between the two Plans is that the present Plan gives the available cash to Kentucky public creditors and the stock of the new company to Columbia, while the proposed amended Plan pays cash to Columbia instead of stock and gives the stock to Kentucky public creditors instead of cash. Clearly, this does not materially and *adversely* affect the interests of creditors, as such interests are now defined by the law of the case. Its effect is a more equitable distribution of the available assets. Changes in the proposed corporate setup to make this more equitable distribution effective are, of course, necessary, but I do not regard such formal changes as being more than a necessary alteration of the present Plan in order to give the stock to Kentucky public creditors instead of to Columbia. Nor, do the proposed changes, as hereinafter pointed out, depart from the law of the case. On the contrary, in the light of present developments, the present Plan no longer follows the law of the case and changes are necessary to carry out those rulings. Accordingly, I do not regard the proposed changes as anything more than necessary alterations permissible under the statute. Any legal bar to its adoption, if any exists, would come from *Sec. 229 of the Bankruptcy Act, Sec. 629, Title 11, U. S. Code*, which provides that when a plan has been substantially consummated, as defined in that section, it may not thereafter be altered or modified so as to adversely affect the participation provided for any class of creditors or stockholders by the plan. The present Plan has not been substantially consummated as therein defined.

The record indicates that the District Judge refused to consider or discuss the merits of the proposed changes, but made the order rejecting them and ordering consummation of the present Plan because he was of the opinion that the changes were predicated solely on an asserted right on the part of the public holders of Kentucky bonds

and debentures to post-bankruptcy interest, and that such asserted right had already been adjudicated adversely to said public holders of Kentucky securities on two prior occasions by this Court. No hearing was held on the merits of the proposed changes. I construe the ruling as one of law holding that the proposed changes were not legally entitled to consideration, rather than an exercise of discretion in deciding whether the merits of the proposed changes were such as to receive his approval, which was necessary under the statute.

Considering it as a legal question, I am of the opinion that the ruling was incorrect. As pointed out hereinabove, this Court held in *In re Inland Gas Corporation*, supra, 241 F. (2) 374, 381-382, C. A. 6th, that Kentucky public creditors were not entitled to post-bankruptcy interest. No doubt, the District Judge had reference to that opinion. The proposed changes pay to Kentucky public creditors a portion (but not all) of post-bankruptcy interest on their claims. The reason for the ruling in 241 F. (2) 374, 381-382, was that it was the well established general rule that creditors in bankruptcy are not entitled to post-bankruptcy interest on unsecured claims, and the Kentucky public creditors, under the facts then existing, did not come within any of the three recognized exceptions to the rule. One of the recognized exceptions referred to in the opinion is that if the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor. At the time when the proposed changes were offered, the debtor had become solvent within the meaning of that exception. American Fuel creditors were being paid in full, and under the proposed changes Columbia would be paid in full, leaving Kentucky public creditors as the only class of creditors remaining. They are, accordingly, entitled to post-bankruptcy interest, insofar as remaining funds are available to do so, before any surplus reverts to the debtor. *American Iron &*

Steel Manufacturing Co. v. *Seaboard Air Line Railway*, 233 U. S. 261, 266; *New York* v. *Saper*, 336 U. S. 328, note 7, page 330; *Littleton* v. *Kincaid*, 179 F. (2) 848, 852, C. A. 4th; *In re F. P. Newport Corp., Limited*, 123 F. Supp. 95 99, S. D. Cal., appeal dismissed, 216 F. (2) 344, C. A. 9th; *Marcalus Manufacturing Co.* v. *United States*, 169 F. Supp. 821, Ct. Cls.

It may be that upon a hearing and discussion of the proposed changes, their merit may or may not be as strong as they now appear in the absence of a hearing and a critical analysis thereof. But, the proposed changes appear to me on their face to have sufficient merit to entitle the proponents thereof to a hearing and consideration of them on their merits. I think it was error to reject them without such a hearing.

I would reverse the judgment and remand the case for a hearing and a consideration of the proposed changes on their merits in accordance with the views expressed herein.

Judgment

No. 13,911

(Filed January 27, 1960)

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

APPENDIX C

EXCERPTS FROM ADDRESS BY J. ARNOLD PINES, CHIEF FINANCIAL ANALYST, DIVISION OF CORPORATE REGULATION, SECURITIES AND EXCHANGE COMMISSION

Inland Gas Corporation—An Epic of Corporate Reorganization

Rutgers University School of Business Administration
February 24, 1960*

* * *

"The value of the Inland estate continued to grow during the proceedings. Although Inland's earning power had initially been insufficient to pay the interest charges on its heavy debt structure, the operations of the company, beginning in the late 1930's, aided by favorable economic conditions, generated sufficient cash, which as I have indicated, was distributed to public creditors of the system.

* * *

"A new reorganization plan was filed by the Trustees in February 1958. It was predicated on a new system valuation of $11,030,000, and provided for a bank borrowing and payment in full of principal and interest on the publicly-held American Fuel Gold Notes (which payment has since been made in the amount of $4,905,632.50);[1] payment of the principal only on the publicly-held Kentucky Fuel bonds and debentures; and distribution to Columbia, in

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* Copies of the address contain the following note:

"The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or the author's colleagues upon the staff of the Commission."

[1] Footnotes are omitted.

recognition of its claims, of all the equity in Inland, as reorganized, represented by the entire issue of a new class of common stock. The aggregate payment to the Kentucky Fuel bondholders and debenture holders would thus amount to $2,466,316—a figure which is based on treating the bulk of a prior cash distribution as a payment of principal rather than interest, and which is less than one-third of their aggregate claim to principal and interest as of August 31, 1959, of $7,658,823. As against the proposed distribution to the Kentucky Fuel public creditors, Columbia would receive 100% of the equity having a value, based on the foregoing over-all valuation, of about $3,021,000. This would exceed Columbia's claims against Inland for principal, and the excess would necessarily represent a payment on Columbia's claims against Inland for interest.

* * *

"Prior to consummation of the Trustees' plan, the appellant bondholders of Kentucky Fuel proposed certain alterations and modifications of the plan. They reflected an estimated valuation of the system's assets, as of approximately August 31, 1959, of some $14,638,000, and were supported by purchase commitments from institutional investors and underwriters. In addition to providing for full payment of principal and interest on the publicly-held American Fuel Gold Notes from funds on hand and to be raised by the sale of long-term debt securities to institutional investors, they provided for payment to Columbia of $5,780,537 in cash, representing the principal plus interest on its secured claims against Inland plus the principal only of its unsecured claims against Inland, and for issuance to the Kentucky Fuel public creditors of new common stock having an aggregate par value of $3,265,160, or about $800,000 in excess of the amount they would receive under the Trustees' plan. However, the Kentucky Fuel public creditors would have the option to receive cash equal to the par value of the stock proposed to be issued to them.

In addition, they would receive the right to subscribe to $694,650 par value of new common stock for cash.

"The bondholders' proposals were opposed by the Trustees and by Columbia. Since Columbia would supposedly receive only $3,021,000 in equity value under the Trustees' plan on the basis of the Trustees' valuation, one must ask why Columbia should resist proposals which would yield it $5,780,000 in cash. Can it be that Columbia does not really value the system's assets at the amount urged by the Trustees and accepted by the courts, but rather at some larger amount, perhaps approximating the value embodied in the bondholders' proposals? We must remember that institutional investors and underwriters are not prone to throw money away, and therefore they would hardly be likely to commit themselves to purchase the securities provided for in the bondholders' proposals unless they were convinced as to the value of the underlying assets. If we apply this higher value to the distributions proposed under the Trustees' plan, the allocation to Columbia would be worth approximately $6,447,000, as compared with the figure of $3,021,000 based on the Trustees' valuation. It would also exceed the $5,780,000 cash payment proposed to be made to Columbia under the bondholders' proposals.

* * *

"I suggest the following points as meriting your consideration:

* * *

"2. I think the court also correctly applied the doctrine of subordination in cutting across corporate lines to give the public creditors of the system a participation ahead of Columbia's debt claims. But I think it did not do so in excluding from participation the small public minority stock interest in Inland. I believe it was unfortunate that the court thereafter applied strict legal rules in disallowing post-bankruptcy interest to so-called unsecured creditors

injured by the controlling stockholder, Columbia, while at the same time allowing such interest to other creditors secured by the same kind of asset—Inland stock—underlying the unsecured claims. The irony of this disparate treatment is that, because the Inland estate increased in value far beyond expectation, the residual equity to be distributed to Columbia under the Trustees' plan is so large that it exceeds not only the principal of its secured and unsecured claims against Inland but also the interest thereon to boot. The later holdings of the court thus largely dissipated its earlier holdings on subordination.

"3. Valuation of an enterprise represents, in the final analysis, the application of unbiased and informed judgment to a mass of financial, operating, and statistical data. It is most important that the person making the valuation keep himself fully informed as to the state of the art of the particular industry of which the enterprise is a constituent part, as well as of important changes which have taken place in the nature of business of the enterprise itself. In the instant proceedings, the valuation submitted on behalf of the Trustees' plan was more than $3,500,000 less than the amount at which sophisticated institutional investors and underwriters, only one year later, agreed to purchase the enterprise. This difference is particularly unusual since it must be borne in mind that a very substantial part of the system's assets are comprised of net current assets, and therefore the difference is one which must be measured solely in terms of the physical assets. It raises a very serious question as to the soundness of the analysis of the Trustees' expert.

* * *

"4. The general principle that justice delayed is justice denied is ordinarily a sound one. In the instant reorganization, however, we have seen that many security holders have benefited from the extended proceedings.

Appendix C—Excerpts From Address by J. Arnold Pines

Thus, had Inland been reorganized at an early date, probably the only ones who would have participated in the reorganized company would have been the public holders of the first mortgage bonds and debentures of Inland, with the latter class being paid less than its full claim. There would have been no participation to the public creditors of American Fuel and Kentucky Fuel. As the proceedings continued over the years, and as Inland began to prosper, the enhancement in the value of the estate was of such magnitude as to permit cash payments of some $14,315,000 to the system's public creditors, leaving to be resolved the controversy as to the relative distributions between the public creditors of Kentucky Fuel and Columbia. In any event, while the proceedings appear to have lasted an inordinately long time, I believe the delay has conferred an overriding benefit on the public creditors as well as Columbia."

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No. 809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

PAUL E. KERN, JEROME PRINCE and CHARLOTTE HEINE,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

BRIEF OF THE COLUMBIA GAS SYSTEM, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON PETITION FOR WRIT OF CERTIORARI

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April 19, 1960

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DEFINITIONS AND REFERENCES

American, Inland and Kentucky: Respectively, American Fuel & Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the three proceedings under Chapter X* of the Bankruptcy Act in the District Court for the Eastern District of Kentucky.

Kern proposals: the "Alterations and Modification of Plan of Reorganization Dated February 25, 1958, as Amended" proposed by Petitioners in the District Court on May 15, 1959.

post-bankruptcy interest: Interest after the institution of a receivership, bankruptcy or reorganization proceeding.

Trustees' Plan: The plan of reorganization for the Debtors filed in the District Court by their Trustees on February 25, 1958, which the District Court confirmed on June 2, 1958, and on June 1, 1959 ordered consummated.

The appendices to the Petition are cited as "Pet. App. "; the appendix to the brief filed by Petitioners in the Court of Appeals as "Kern App "; and the appendix to the brief filed by Columbia in the Court of Appeals as "App. ".

Citations to the opinions below are to the reproduction thereof contained in Appendix B to the Petition.

Emphasis has been supplied to quotations in which emphasis appears.

*The various Chapters and Sections of the Bankruptcy Act are fully cited in the Table of Authorities and are referred to herein only by original Chapter or Section numbers.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Petitioners state two "Questions Presented", the first relating to procedures under Chapter X of the Bankruptcy Act for the consideration of reorganization proposals, and the second relating to the asserted substantive right on which Petitioners based their reorganization proposals. Since no question relating to Chapter X procedures is presented if, as the Court below held, Petitioners do not have the substantive right on which they based their proposals, we would reverse the order of the "Questions Presented" and restate them as follows:

1. Substantive Right

The Court of Appeals in 1957 determined that the equitable claims of creditors of the Debtor *Kentucky* against the assets of the affiliated Debtor *Inland* do not include post-bankruptcy interest, and reaffirmed that decision in 1959 on appeals from an order confirming a Trustees' Plan expressly based thereon. Did the Court of Appeals err in 1960 by adhering to these decisions and affirming an order of the District Court which (i) rejected reorganization proposals which would have provided for post-bankruptcy interest to creditors of Kentucky from Inland assets and (ii) directed consummation of the Trustees' Plan?

2. Chapter X Procedures

Did the District Court abuse its discretion by refusing to begin new proceedings with respect to reorganization proposals which, although purporting to be an "alteration" of the confirmed Trustees' Plan, provided for a reorganization based on different principles of creditors' rights and a new valuation, to be financed by changed methods and to be carried out by different procedures?

COUNTERSTATEMENT OF THE CASE

I. Introduction

This petition for certiorari is the third attempt by Petitioner Kern to obtain review of rulings by the Court of Appeals that the equitable rights of unsecured creditors of one of the Debtors (Kentucky) do not include a right to post-bankruptcy interest out of the assets of another of the Debtors (Inland):

(i) In February, 1957, upon appeals by Petitioner Kern, the Trustee of Inland and Kentucky and others, the Court of Appeals affirmed an order of the District Court which refused to allow the payment from assets of Inland of post-bankruptcy interest to creditors of Kentucky, and directed the Trustees to prepare and submit for proceedings under Chapter X a reorganization plan in conformity with that ruling. This Court denied petitions for certiorari (including one filed by Petitioner Kern) to review that decision.

(ii) In January, 1959, the Court of Appeals affirmed an order of the District Court confirming a Trustees' Plan which provides that post-bankruptcy interest is not to be paid to unsecured creditors of Kentucky. This Court denied petitions for certiorari (including one filed by Petitioner Kern) to review that decision.

(iii) In January, 1960, the Court of Appeals affirmed an order of the District Court which refused to start plan proceedings upon reorganization proposals offered by Kern providing for post-bankruptcy interest from the assets of Inland to the unsecured creditors of Kentucky, and directed that the confirmed Trustees' Plan be carried out forthwith. This is the decision of which the present Petition seeks review.

We respectfully refer the Court to the briefs which we filed in connection with Kern's petitions for certiorari referred to above.* In the Counterstatement which follows, we review briefly the facts and prior proceedings which bear on the questions presented by the Petition.

II. Events Prior to the Post-bankruptcy Interest Decisions

1930-1951

1. These three proceedings in Chapter X relate to three Debtors affiliated by stock ownership. One of the Debtors (Inland) owns all the operating assets. Of the other two Debtors, American owns 72.6% and Kentucky 26% of Inland's capital stock. Kentucky has no other assets. The Petitioners are creditors of Kentucky.

2. Each proceeding began as an equity receivership (Inland and Kentucky in 1930; American in 1934); continued as a proceeding under former Section 77B of the Bankruptcy Act during the entire operating life of that statute, and each has continued as a proceeding in Chapter X during the entire life to date of that statute.

3. Each of the Debtors had outstanding, when proceedings were instituted, large amounts of debt securities. Part of the debt securities of each Debtor were publicly held and part of each were owned by Columbia. Columbia owns now what it owned when the proceedings were instituted; the publicly held securities have been widely and actively traded during the period of the proceedings.

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*Consolidated Brief in Opposition to Petitions Nos. 325, 336 and 342 (October Term, 1957); Consolidated Brief in Opposition to Petitions Nos. 756, 766 and 774 (October Term, 1958) and the Memorandum in Reply to the Securities and Exchange Commission in such cases.

4. In 1945, the Court of Appeals held that, for equitable reasons, Columbia's claims against each of the Debtors should be subordinated to the claims of the public creditors of that Debtor. Columbia had strongly, but unsuccessfully, contended both before the District Court and the Court of Appeals, both as to the asserted facts and as to the law, that this subordination was not justified. Columbia petitioned this Court, on the points of law involved, for certiorari, which this Court denied.*

5. Thereafter, in plan proceedings before the District Court, it became apparent that Inland's assets would be sufficient to pay all its own public creditors in full and leave a surplus of Inland's assets for Columbia's subordinated claims against Inland. The District Court approved a plan recognizing such a recovery for Columbia, but the Court of Appeals reversed (in 1951) and granted further equitable relief to the public creditors of American and Kentucky. It did so by holding that, in equity, such creditors should be treated as "quasi-creditors" of Inland and that the surplus Inland assets should be allocated to the payment of their claims in proportion to the respective stock interests of their own Debtors in Inland (72.6% American, 26% Kentucky).**

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*_Columbia Gas & Electric Corp. v. United States_, 151 F. 2d 461 (6th Cir. 1945), _cert. denied_, 329 U. S. 737.

The statement in the Petition (p. 3, n. 1) that this decision subordinated Columbia's claims against each of the Debtors to the claims of all other creditors "in the System" is a fantasy of Petitioners. The three proceedings were not consolidated, three separate appeals were taken and a separate mandate subordinating Columbia's claims was entered in each of the three proceedings. The Court of Appeals has been emphatic that it would not treat the Debtors as a single economic entity with creditors of each treated as though they were creditors of that single entity. See, for instance, _In re Inland Gas Corp._, 211 F. 2d 381, 383 (6th Cir. 1954).

**_In re Inland Gas Corp._, 187 F. 2d 813 (6th Cir. 1951).

6. Columbia had strongly contested this additional grant of equitable relief to public creditors of American and Kentucky. However, believing that that decision (although adverse to it) opened the way for a prompt reorganization of the Debtors, Columbia did not petition for certiorari, and for the next five years (1951-1956) participated in District Court proceedings only as observer and did not participate in any of the appeals during that period.

1951-1956

7. The hope of prompt reorganization proved illusory. With Columbia on the sidelines, the diligent efforts of the District Court and the Trustees to accomplish a reorganization were thwarted by continuous internecine warfare among the public holders of various securities of Kentucky and American and their representatives.* Aspects

*Kern praises the longevity of these proceedings for resulting in "the highest achievement attainable under the Bankruptcy Act" (Pet. p. 3)—payment of many of the Debtors' securities issues in full—which he likens to a series of "piecemeal" reorganizations. We doubt that this atomization of the reorganization process over 30 years constitutes the "highest achievement" attainable under the Bankruptcy Act". *Cf. Ecker* v. *Western Pacific R. R.*, 318 U. S. 448, 508-509 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 318 U. S. 523, 542-546 (1942); *RFC* v. *Denver & Rio Grande Western R. R.*, 328 U. S. 495, 520-524 (1946). In the *Milwaukee* case this Court made a statement (318 U. S. 523, 545) which we believe applicable to Chapter X:

> "... Nor can we conclude that there is anything in § 77 which indicates that it may be used *merely as a moratorium*. ... We cannot conclude that in this proceeding, which already has been pending *seven* years and which was before the Commission for over *four* years, the interests of junior claimants have been sacrificed for speed. ..."

Furthermore, the length of these proceedings is not a reflection of the customary judicial dilemma in depression era reorganizations arising from the fact that prompt reorganization precludes recognition of junior interests at a time of abnormally depressed values while delayed reorganization prejudices the rights of senior interests. The past decade of these proceedings (all years of prosperity and high value) reflect not such a judicial dilemma but persistent and unmeri-

of such litigation are reflected in the opinions of the Court of Appeals in *In re Inland Gas Corp.*, 208 F. 2d 13 (6th Cir. 1953), *In re Inland Gas Corporation*, 211 F. 2d 381 (6th Cir. 1954) and *In re Inland Gas Corp.*, 217 F. 2d 207 (6th Cir. 1954).

8. During this five-year period in which Columbia did not participate, the Court of Appeals gave further equitable relief to public holders of Kentucky Bonds. By 1954 it was apparent that the 72.6% of the excess Inland assets which the Court had allocated to American public creditors in 1951 (see par. 5 above) would more than suffice to pay full principal and interest on their secured claims. At the urging of Kentucky creditors, the Court of Appeals held that the excess of the American creditors' 72.6% quasi-creditor share of Inland assets should be applied to the claims of the public holders of Kentucky Bonds.*

III. The First and Second Post-bankruptcy Interest Decisions

1956-1960

9. The District Court on March 14, 1956, entered the order described in sub-paragraph (i), p. 2, above. On the appeals from this order, Columbia participated as appellee. The Court of Appeals affirmed, one judge dissenting. The Court in its opinion expressly asserted that it could, in effect, award post-bankruptcy interest to Kentucky creditors from Inland's assets by a complete rejection of Columbia's claims,

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torious litigation by Kern. Commencing with his acquisition of 34% of the Kentucky bond issue, he has generated controversy after controversy in the District Court and, after adverse decision, assiduously pursued his appellate remedies (six appeals in the past seven years, all found to be without merit and several found to be attempts to relitigate prior decisions of the Court of Appeals).

In re Inland Gas Corp., 211 F. 2d 381 (6th Cir. 1954).

but declined to exercise that authority. This Court denied certiorari.*

10. The Trustees, pursuant to the direction of the District Court's order so affirmed, prepared and filed in February, 1958 the Trustees' Plan here involved. That Plan states as one of the "Principles Governing Reorganization", that:

> "In compliance with the latest decision of the Court of Appeals in the Proceedings, the quasi-creditor claims against Inland of the holders, other than Columbia, of Kentucky Bonds and Debentures do not include Post-bankruptcy Interest."

On the basis of that principle, the Trustees' Plan provides for payment to public creditors of Kentucky from the assets of Inland of full principal and pre-bankruptcy interest, but no post-bankruptcy interest from such assets.**

Hearings on the Trustees' Plan were held through the spring of 1958. The District Court received expert testimony and other evidence in support of the valuation of the Debtors' properties (derived from estimates of future earnings) on which the Plan is based. Petitioner Kern filed voluminous objections and proposed amendments to the Plan. He also criticized the Plan valuation as inadequate and, in support of that criticism, sponsored witnesses who testified that, under stock market conditions then extant, there could be sold at par an amount of stock in the reorganized company which was much greater than the amount of stock which the Plan provided for distribution on creditor claims.

11. By various orders culminating in an order entered June 2, 1958, confirming the Plan, the District Court (1)

In re Inland Gas Corp., 241 F. 2d 374 (6th Cir. 1957), *cert. denied*, 355 U. S. 837.

**A summary of the principal provisions of the Trustees' Plan appears at pp. 24-26 of this Brief.

determined that the valuation of the Debtors set forth in the Plan is fair, (2) determined that each of the Debtors is insolvent, and (3) found that the Plan is fair, equitable and feasible and in compliance with all applicable provisions of the Bankruptcy Act.

12. Petitioner Kern appealed from the order confirming the Trustees' Plan. He urged that the Court of Appeals repudiate its 1957 decision; that the District Court had misunderstood and misapplied the principles of that decision; and that the District Court was wrong in adopting the Trustees', and not Kern's, valuation method and valuation figure. On January 15, 1959, the Court of Appeals dismissed his appeal. In so doing, it said:

> "... [W]e find that the district judge exercised sound discretion in adopting the evaluation which he did, upon the basis of the expert evidence before him."

The Court of Appeals then found that the principles stated in its 1957 decision had been correctly applied and were dispositive of all Kern's other contentions. The Court, in a unanimous opinion, said:

> "... It is obvious that the district judge attempted to the best of his ability and understanding —and we think successfully—to apply the principles stated in our last opinion [241 F. (2d) 374] and to put into full effect the mandate of this court. ...
>
> "We are of opinion, further, that Judge Ford appropriately applied the adjudication of this court in 241 F. (2d) 374, with respect to post-bankruptcy interest and all other issues before him. ..."*

Kern's petition for certiorari was denied on April 27, 1959.**

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*262 F. 2d 510, 511.
**359 U. S. 979.

IV. The Third Post-bankruptcy Interest Decision (the Decision Below).

13. Upon denial of certiorari to the *second* post-bankruptcy interest decision (i) the Trustees petitioned the District Court for an order to aid consummation of their Plan* and (ii) Kern *et al.* brought forward their petition to "alter" the confirmed Plan as provided in their proposals (denominated "Alterations and Modifications").

These proposals would have provided the Kentucky creditors a recovery, from Inland assets, on account of post-bankruptcy interest on their claims against Kentucky. To accomplish this end the proposals would have changed every operative provision of the Trustees' Plan.**

14. The District Court received memoranda and heard argument for a full court day; on the following day, stating that he had reached his decision "after having considered the entire picture of our problem", the Judge refused to begin new proceedings on the Kern proposals and directed prompt consummation of the confirmed Trustees' Plan. The Court of Appeals affirmed.

One ground of the District Court's decision, and one ground of the decision of the Court of Appeals affirming it, was the conclusion that the Kern proposals were an attempt to relitigate the 1957 and 1959 decisions of the Court of Appeals that the unsecured Kentucky creditors are not entitled to post-bankruptcy interest from the Inland estate.

Both courts also expressly based their decisions on the grounds that the Kern proposals in substance were a new

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*The Trustees' Plan provides that it shall be carried out as soon as practicable after the confirmation order has become final and not subject to further review.

**A summary of the principal changes in the Trustees' Plan proposed by Petitioners appears at pp. 26-28 of this Brief.

plan and not an "alteration" or a "modification" of the confirmed Trustees' Plan, the Court of Appeals stating that the District Court did not abuse its discretion in so finding them and in refusing to begin new plan proceedings.

SUMMARY OF ARGUMENT

The Court of Appeals has determined that these proceedings should be terminated by consummation of the confirmed Trustees' Plan, and that new proceedings with respect to the Kern proposals should not be commenced. Its decision rests on grounds which clearly are right and which present no question which should be reviewed by this Court.

The Kern proposals were based upon an asserted "quasi-creditor" right of *Kentucky* creditors to recover post-bankruptcy interest from the assets of *Inland*. Twice prior to the decision below, the Court of Appeals had determined that the "quasi-creditor" rights, which *it* had conferred on Kentucky creditors, do *not* include post-bankruptcy interest. It has so ruled for the third time. No important question of Federal law is presented by its decision so reaffirming the scope of equitable rights created by it. The arguments by Petitioners that the Court of Appeals ought to have departed from its prior decisions—one based on an asserted "windfall" which Columbia would otherwise derive, and the other based on an asserted "solvency" of Inland (not *Kentucky*)—are without substance.

The Court of Appeals also was right in holding that the District Court did not abuse its discretion in refusing to begin new proceedings on the Kern proposals. The statute makes plain, and judicial decisions confirm, that proposals to "alter" a confirmed plan are addressed to the discretion of the Court, which should not be exercised in favor of proposals which are in substance a new plan. The Kern proposals would have eliminated or substantially changed

every operative provision of the Trustees' Plan, including its valuation and findings that all the Debtors are insolvent; its principles of creditor participation; its method of financing reorganization and its detailed procedures for consummation. The decision, upon exercise of discretion, that such proposals were a new plan presents no question which this Court should review. Petitioners' argument that the decision conflicts with the Second Circuit's ruling in *Knight* v. *Wertheim* is without merit, since the Court in *Knight* applied the same principles as the Court of Appeals, and expressly found that the limited plan changes there involved were not a new plan.

The Petition should be denied.

ARGUMENT

I.

NO IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED BY THE DECISION OF THE COURT OF APPEALS, REAFFIRMING ITS 1957 AND 1959 DECISIONS, THAT UNSECURED CREDITORS OF THE DEBTOR KENTUCKY ARE NOT ENTITLED TO POSTBANKRUPTCY INTEREST FROM THE ASSETS OF THE DEBTOR INLAND.

A. The Court of Appeals Has Determined that the Kern Proposals, in Claiming Post-bankruptcy Interest for Kentucky Creditors out of Inland Assets, Were Contrary to its 1957 and 1959 Decisions, and that the District Court Properly Rejected Them for this Reason.

Petitioners' proposals were squarely based on an assumed substantive right of public holders of *Kentucky* securities to the payment of post-bankruptcy interest directly from the assets of *Inland*. If such right did not exist in law or

equity, Petitioners' proposals were properly rejected without regard to the other problems they posed.

No statute or contract gives the creditors of Kentucky any rights against the assets of Inland. Petitioners' asserted right to post-bankruptcy interest from Inland assets depended entirely upon their interpretation of the decisions of the Court of Appeals which created and defined their "quasi-creditor" claim. They contended that such decisions had given them that right. *Contra*, those supporting the Trustees' Plan urged that the 1957 and 1959 decisions of the Court of Appeals had each expressly determined that the quasi-creditor claim given the Kentucky creditors does not include post-bankruptcy interest.

Both the District Court and the Court of Appeals rejected Petitioners' interpretation of the prior decisions of the Court of Appeals and held that the asserted "quasi-creditor" claim for post-bankruptcy interest was non-existent.

The District Court was emphatic to this effect when it said that the Kern proposals were

> "... predicated only upon the assertion of a right on the part of the public holders of Kentucky bonds and debentures which has already been adjudicated adversely to them and to their claims. ... I think that to grant the hearing that is sought upon this proposed substituted Plan would be to clearly disregard the decisions of the Court of Appeals to the effect that these quasi-creditor claims on behalf of Kentucky creditors do not include [post] bankruptcy interest ..."*

Petitioners' appeal from this decision presented the basic question of the existence or non-existence of the substantive right to post-bankruptcy interest from Inland assets asserted in the Kern proposals. The Court of Appeals made crystal

*Transcript of Proceedings, May 28-29, 1959, Kern App. 66a-67a.

clear that it had twice previously decided that such a substantive right did *not* exist and that it was now again reaffirming those decisions. After a summary background statement, that Court stated:

> *As to its 1957 and 1959 decisions*: ". . . our last two opinions, . . . reported respectively at 241 F. 2d 374 (1957) and at 262 F. 2d 510 (1959) relate to, *and we think control*, the issues directly presented by the present appeals." (Pet. App. 5c)
>
> *As to its 1957 decision*: ". . . we held directly that post-bankruptcy interest should not be allowed the public holders of bonds and debentures of the Kentucky Gas and Fuel Corporation." (*id.* at 5c and 6c)
>
> *As to its 1959 decision*: In the opinion ". . . reported at 262 F. 2d 510 . . . we stated that United States District Judge Ford had appropriately applied our adjudication set out in 241 F. 2d 374 [the 1957 decision] with respect to post-bankruptcy interest and to all other issues before him." (*id.* at 5c)
>
> *As to the District Court's action*: ". . . At the conclusion of the hearing, the district judge announced his denial and rejection of the proposed petition for alterations and modifications and granted the petition of the [Trustee of] Inland Gas Corporation for an order consummating the plan . . . *We are of opinion that the United States District Court correctly and faithfully followed the mandate of this court.*" (*id.* at 6c)

Thereafter, plainly in response to the detailed arguments made by the Inland Trustee and Columbia, as appellees, that the asserted quasi-creditor claim for post-bankruptcy interest had been rejected by its 1957 and 1959 decision, the Court of Appeals said:

> "The appellees are correct in their assertion that the proposed "alterations and modifications" consti-

tute an attempt to relitigate matters previously decided by this Court and that the District Judge did not abuse his discretion in denying them consideration" (*id.* at 13c).

B. Adherence by the Court of Appeals to Its 1957 and 1959 Decisions Raises No Important Question of Federal Law.

The decision below, refusing for the third time to create an equitable claim in public creditors of Kentucky for post-bankruptcy interest from the assets of Inland was neither an abuse of discretion nor the source of any important question of federal law. No one can purport to catalogue the equitable considerations which were weighed by the Courts below in initially deciding the question in 1957. But whatever the equitable considerations found decisive at that time, the proceedings conducted in reliance upon that decision and upon the 1959 decision reaffirming it, constitute an additional factor which supports the 1960 decision of the Court of Appeals to adhere to its former decisions.

A plan (the Trustees' Plan) was developed and fully considered on the basis of the 1957 decision. Kern had (and fully utilized) the right to present, prior to confirmation of the Trustees' Plan, his own reorganization proposals. These were rejected by the District Court, which confirmed the Trustees' Plan, and the 1959 decision of the Court of Appeals fully approved the District Court's action upon appeal by Kern. In considering Kern's third appeal on the post-bankruptcy interest question—this time, from the District Court's order to carry out the confirmed and affirmed Trustees' Plan—the Court of Appeals properly could consider the enormous *quanta* of time, effort and money expended toward accomplishment of reorganization on the premise stated in the confirmed Trustees' Plan—that the quasi-creditor claim of the Kentucky creditors does not include post-bankruptcy interest. The decision of the

Court of Appeals to adhere to its 1957 and 1959 decisions under the circumstances clearly was not an abuse of discretion.

The facts of this proceeding are obviously unique and virtually impossible of recurrence; and, for this reason, the decision of the Court of Appeals, inextricably dependent on such facts, does not raise any important question of federal law. Indeed, Petitioner Kern no longer contends that the Court of Appeals misunderstands the rules of law relating to post-bankruptcy interest. This year's certiorari petition is but a renewed complaint against the refusal of the Court of Appeals to grant additional equitable relief to Kentucky creditors. The thrust of the Petition is that the stock underwritings contemplated by the Kern proposals made it necessary to grant such additional equitable relief because

> (i) in view of the value placed by the underwriters on the stock of Inland, refusal to create a quasi-creditor claim for post-bankruptcy interest would result in a "windfall" to Columbia; and
>
> (ii) the proposed underwritings showed that Inland (though not Kentucky) had become "solvent", and under the decision of this Court in the *American Iron and Steel Mfg. Co.** case, creditors of a "solvent" debtor are entitled to post-bankruptcy interest.

Petitioners argued and briefed both these contentions to the Court of Appeals. Neither was found persuasive by the majority of that Court as calling for a departure from its prior decisions. In subdivisions "C" and "D" which follow, we treat briefly the reasons which support the decision below in this regard.

**American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261.

C. Adherence by the Court of Appeals to Its 1957 and 1959 Decisions Involves No "Windfall" to Columbia.

The Petition urges that the decision of the Court of Appeals "enables Columbia to escape with a windfall, over and above its allowable claims . . ." (Petition, p. 13). This statement (and others of the same tenor with which the Petition is spiced) are demonstrably false. The record includes a computation made by S. E. C.'s representative in the District Court proceedings, full of assumptions favorable to proving a windfall. Such assumptions included valuing the Inland properties on the basis of the capitalization which the Kern proposals would give the new company. Even using this stock-market valuation, the computation showed that the value of the stock to be issued to Columbia under the Trustees' Plan was then* *less* than the total amount of its claims against the Debtor Inland alone. The computation also showed that if reorganization were to be delayed long enough there would come a point when cash accumulated from Trustee earnings, plus the underwriter's capitalization, would begin to produce a value to Columbia in excess of its claims against Inland.**

*The computation with respect to the alleged "windfall" was presented to the District Court in May, 1959, when the Kern proposals were before that Court. It purported to demonstrate that, by the then future date of August 31, 1959, on the basis of the stock market valuation, the value of the securities going to Columbia under the Trustees' Plan would exceed Columbia's total claims against *Inland* (*i.e.*, not including Columbia's claims against *American* and *Kentucky*) by something less than $200,000. But reversing this very computation and backtracking from the then future August 31 to the May date when it was presented, there was no "windfall" (even on the stock market valuation). The computation appears at pp. 49b-50b of the Appendix to Columbia's Brief in the Court of Appeals, filed as part of the record before this Court.

**The Petition includes as "Appendix C", apparently as material to the "windfall" argument in particular, excerpts from an address by J. Arnold Pines, Chief Financial Analyst, Division of Corporate

But such excess, if any, is in no sense "windfall" to Columbia. Columbia holds large and wholly unsatisfied claims against the Debtors American and Kentucky, which the *Trustees' Plan recognizes as valid and for the participation of which it provides.** Columbia is Inland's junior creditor. If there exist any Inland assets in excess of Columbia's claims against Inland, under normal principles of reorganization law such assets pass into the respective estates of Kentucky and American, in proportion to their ownership of the stock of Inland (26% and 72.6%, respectively); and, as Columbia is the only creditor of either American and Kentucky whose claims for principal have not been satisfied, such assets would then be properly assigned to the payment of its claims against each such Debtor.

D. Adherence By the Court of Appeals to Its 1957 and 1959 Decisions Does Not Conflict With the Decision of this Court in American Iron and Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261.

The Petition urges that the decision of the Court of Appeals conflicts with the decision of this Court in the *American Iron and Steel* case in failing to give to Kentucky creditors the benefit of the principle that post-bankruptcy interest should be paid to unsecured creditors if the debtor proves solvent. It is argued that the Kern proposals to pay Columbia's claims against Inland established that Inland is "solvent"; and that as unsecured creditors of a "solvent" debtor, Kentucky creditors were entitled to post-bankruptcy interest from the "solvent" Inland estate under that principle.

Regulation, Securities and Exchange Commission, delivered at the Rutgers University School of Business Administration. We present in the appendix to this brief some comments with respect to the statements made in that address.

*Plan, Art. VI, Sec. 2(a).

An initial and basic failure in this argument is apparent from the discussion above. No possibility of conflict with the decision in *American Iron and Steel* exists if the quasi-creditor claim given Kentucky creditors by the Court of Appeals does not include post-bankruptcy interest whether or not Inland is solvent. Certainly that Court had authority in defining the extent of Kentucky creditor participation in Inland assets as "quasi-creditors", to say that such participation does not include post-bankruptcy interest whether or not *Inland* proves solvent.* The District Court has so understood the Court of Appeals, and the Court of Appeals, for the second time, has said that the District Court correctly and faithfully followed its mandate. Clearly, the decision of the Court of Appeals rests on grounds which preclude any conflict with *American Iron and Steel.*

There are other reasons why rejection of the Kern proposals does not conflict with *American Iron and Steel,* even assuming, contrary to fact, that Kentucky creditors are entitled to post-bankruptcy interest if *Inland* is solvent. We mention one of them here to correct the statement in the Petition that the Kern proposals met the requirements of the "solvency exception". Certainly they did not. The basic and obvious prerequisite to applicability of the "solvency exception" is that the debtor be solvent—that there exist a surplus of assets in excess of *all* claims.** This Court in *American Iron and Steel,* after citing the passage from

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*Apart from the "quasi-creditor" doctrine and under rules of law generally applied, only the solvency of *Kentucky* would give *Kentucky* creditors a basis for claiming the benefits of the "solvency exception". Petitioners do not question the continued and hopeless insolvency of Kentucky.

**As stated in Blackstone:

> ". . . [T]he usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the [receiver's] commission, yet, if case of a surplus left *after payment of every debt,* such interest shall again revive . . ." (2 Blackstone, Commentaries * 488)

Blackstone quoted in the footnote, said that the principle applied "where the assets ultimately prove sufficient to pay *all debts in full*" (233 U. S. at 267). The Kern proposals did not meet this basic requirement. They showed that the funds to make Inland "solvent" by paying Columbia's Inland claims would come in substantial part, not from the "practical offers of hard money", etc. (Petition, p. 8) from underwriters, but from funds held by the Inland Trustee and set aside by the Trustees' Plan for the payment of the reorganization expenses of all the Debtors and for payment of certain other priority claims. In short, the Kern proposals did not provide funds sufficient for the payment of all claims against Inland. They provided funds sufficient to pay Inland's junior creditor (Columbia) by deferring payment of some of Inland's senior creditors. If such proposals proved anything other than Kern's persistence, they proved that, as the Plan states and the courts below determined, Inland is insolvent.

We omit in the interests of brevity a statement of additional reasons why there is no conflict here with *American Iron and Steel* and other decisions which have applied the "solvency exception". One related argument in the Petition, however, deserves brief comment—the argument (Petition, pp. 24-5) that certiorari should be granted in this case because the lower federal courts would be helped by an opinion of this Court defining generally the exceptions to the principle that interest does not accrue after commencement of bankruptcy proceedings. We think this invitation to render an advisory opinion points up sharply Petitioners' lack of decent grounds for certiorari.

II.

THE RULING OF THE COURT OF APPEALS THAT IT WAS NOT AN ABUSE OF DISCRETION FOR THE DISTRICT COURT TO REFUSE TO BEGIN NEW PLAN PROCEEDINGS ON THE KERN PROPOSALS (A) DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW, AND (B) DOES NOT CONFLICT WITH THE DECISION OF THE SECOND CIRCUIT IN *KNIGHT* v. *WERTHEIM*.

A. Refusal to begin new plan proceedings on the Kern proposals does not present any important question of federal law.

The authority to effect any change in the confirmed Trustees' Plan derives exclusively from Section 222 of the Act. Section 222 provides that a plan may be "altered or modified", after confirmation "with the approval of the judge", and, if the "alteration or modification" is one which "materially and adversely" affects the interests of creditors, after hearings and other proceedings are had with respect to it.* The Kern proposals were offered under Section 222 as an "alteration or modification" of the confirmed Trustees' Plan. It was alleged that the proposals "materially and adversely affect the interests of creditors".** The District

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*Section 222 is quoted in full at Pet. App. 1c.

**Kern Petition for Alterations, etc., para. 8. One creditor adversely affected by the Kern proposals was Columbia, whose claims against American and Kentucky are treated by the confirmed Plan as "entitled to participate". The Kern proposals, as the District Court pointed out, would have treated such claims as "not entitled to participate". This fact, and the fact that Kern himself alleged that his proposals materially and adversely affected creditors, greatly detract from the position of Judge Miller, dissenting below, that the proposals did *not* have such adverse effect and that therefore Judge Ford abused his discretion in refusing to accept them. With the greatest respect for Judge Miller, we submit that his dissenting opinion is based on a misapprehension of Section 222; material and adverse effect is *not* the test for determining whether an "alteration" may be

Court, with which the Court of Appeals agreed, refused to begin the hearings and other proceedings specified in Section 222.

1. The Principle Applied By the Courts Below

The principle applied by both Courts is that proposals to "alter" a confirmed plan are addressed to the discretion of the Court and that sound discretion requires the rejection of proposals which, because of the nature and extent of the changes they require, are in substance a new plan.

The *principle* thus applied to the Kern proposals is abundantly supported by authority: every reported decision under former Section 77B or Chapter X with respect to a proposed "alteration" to a confirmed plan recognizes it. *E.g.*, *Country Life Apartments, Inc.* v. *Buckley*, 145 F. 2d 935 (2d Cir. 1944) (affirming rejection of reorganization proposals found to constitute a new plan):

> "Appellants' proposals . . . . differed so greatly from the trustee's plan that they could not possibly be treated as a mere modification . . ."
>
> ". . . Upon ascertaining this fact, the District Court was not required to listen to further arguments on the merits of the proposals, and hence committed no error in denying appellants further opportunity to be heard." (at p. 937)

Knight v. *Wertheim*, 158 F. 2d 838 (2d Cir. 1946) (reversing rejection of reorganization proposals upon finding that such proposals did *not* constitute a new plan):

> ". . . [T]he order [rejecting a proposed alteration of a confirmed plan] may not be disturbed unless

filed; Section 222 permits the judge, in his discretion, to permit the filing of an "alteration" whether or not it materially and adversely affects security holders; adverse effect is the test of whether or not the judge must hold a hearing upon an alteration "filed with his approval", and start again the series of statutory steps leading to plan approval, acceptance and confirmation.

he overstepped the permissible limits of his discretion. . . . (at p. 841)

". . .

". . . We said in our opinion [in *Country Life, supra*] that there was a limit to what might be considered an 'alteration' or a 'modification' and that the proposal had exceeded it . . .

". . . [T]he proposed changes themselves [were not] so radical as to fall within our decision in Country Life. . . ." (at pp. 842, 843)

Prudence-Bonds Corp. v. *City Bank Farmers Trust Co.*, 186 F. 2d 525 (2d Cir. 1951) (affirming order which approved amendment of plan):

". . . [T]he court may never under the guise of 'alteration' or 'modification' substitute an entirely new 'plan' in place of the original; although what is the line between a substitute and an 'alteration' or a 'modification' is necessarily left at large.

". . .

"The question is one of discretion, though of a discretion which should be sparingly exercised. . . ." (at p. 528)

These authorities, and the decision below, are firmly grounded in the Chapter X scheme, under which there is a regular sequence of steps leading to the confirmation of a plan.* As set forth in the footnote, Chapter X makes

*The sequence of such steps in all cases in which the debtor's indebtedness exceeds $3,000,000, is in summary as follows:

(1) *Trustee's Preparation of a Plan.* The Judge must fix a time within which the trustee shall prepare and file a plan (or a report why a plan cannot be effected) (Sec. 169).

(2) *Hearing on This, and Other, Plans.* The judge must also fix a date for hearing on the trustee's plan, on objections thereto and on "such amendments *or plans* as may be proposed by the debtor or any creditor or stockholder" (Sec. 169).

specific provisions for consideration, prior to confirmation, of plans alternative to the trustee's plan, and does not make District Court approval a prerequisite to the filing of such alternative plans. The Act then provides for confirmation of the one plan which has been accepted by creditors and stockholders, and states that, upon confirmation, "the plan and its provisions shall be binding upon the debtor . . . and upon all creditors and stockholders. . . ." (Section 224(1)). Confirmation does not cut off the authority of the Court to approve even an "alteration" which adversely affects creditors. But after a plan has been developed, accepted by creditors and confirmed, it is for the Court, and not each creditor group, to determine

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(3) *Advisory Report of SEC.* After this hearing, the Judge must submit to SEC for examination and a report (to be advisory only) "the plan *or plans* which [he] regards as worthy of consideration" (Sec. 172).

(4) *Approval of Plan or Plans.* The Judge must not enter an order approving a plan until SEC has filed its report or notified him that it will not file one or until the expiration of such reasonable time as he has fixed (Sec. 173). Thereafter, the Judge "shall enter, an order approving the plan *or plans*" which shall include the Act's required provisions (Sec. 216), and are fair, equitable and feasible (Sec. 174).

(5) *Submission for Acceptance by Affected Creditors and Stockholders.* The Judge must fix a time within which affected creditors and stockholders may accept (Sec. 174), and the trustee must transmit to all affected creditors and stockholders, "*the plan or plans* so approved", the opinion of the Judge approving it or them and the report of SEC (and also, or alternatively, summaries of them), (Sec. 175).

(6) *Confirmation of Plan.* After a plan has been accepted by the required percentages of each class of creditors and stockholders affected by the plan (⅔ for a creditor class, a majority for stockholders) there is to be a hearing for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation (Sec. 179). The prior "approval" order (item 4 above) is not to affect the right of a creditor or stockholder to object to "confirmation" (Sec. 180).

The Judge is to confirm the plan if satisfied that it is fair and equitable and feasible and if satisfied as to other matters enumerated (Sec. 221).

whether *part* of the progress made toward reorganization is to be scrapped by consideration of proposals to "alter" a *provision* of the plan. The plainest considerations of orderly procedure and concern for time and expense strongly urge that the Court's discretion be exercised against scrapping *all* the progress made toward reorganization and embodied in a confirmed plan, by beginning consideration of proposals which in substance are a new plan.

2. The Trustees' Plan and the Kern Proposals

The District Court and the Court of Appeals correctly applied these principles, as comparison of the Trustees' Plan and the Kern proposals plainly reflects.*

The Trustees' Plan is based upon:

(a) a statement of principles governing priority of claims against, and participation in the assets of, the Debtors (set forth in Art. I, Sec. 2, "Principles Governing Reorganization", App. 5b);

(b) a valuation of the Debtors' (principally Inland's) properties and business of $7,199,100 which with Trustees' excess cash (cash not required for reorganization expenses and new company working capital) produced a reorganization value as of December 31, 1957, of $10,538,000 (Art. V, Sec. 3, App. 19b); and

(c) findings that each of the Debtors is insolvent (Art. I, Sec. 2, App. 6b).

*The full extent of such changes in the confirmed Plan proposed by Petitioners appears from the consolidated printing of the confirmed Plan and the Kern proposals included in the appendix to our Brief in the Court of Appeals, filed as part of the record before this Court. Page citations in the comparison above ("App. 5b", etc.) are to such appendix.

The Trustees' Plan provides for:

(d) an unsecured borrowing by the Inland Trustee from Chemical Corn Exchange Bank in the amount of $4,000,000 to provide funds which, with Trustees' cash, will suffice to pay in cash all claims against the Debtors other than Columbia's (Art. VIII, Sec. 2, App. 27b);

(e) the payment by the Trustees of such claims—principally the publicly-held secured American Notes (principal and full interest) and the publicly-held Kentucky Bonds and Debentures (principal and pre-bankruptcy interest only) (Art. VIII, Sec. 3, App. 28b);

(f) the reservation by the Trustees prior to the transfers mentioned in the next subdivision (g), of funds to pay all Class 1 claims against the Debtors (Class 1 claims being so defined as to include amounts which the District Court, prior to confirmation, had ordered paid to public holders of securities of American, Inland and Kentucky, amounts to be distributed under the Plan to public holders of American Notes and Kentucky Bonds and Debentures, and reorganization fees and expenses) (Art. IX, Sec. 4; App. 36b);

(g) the transfer of physical properties and remaining cash balances of the Debtors to a new corporation which would assume the Inland Trustee's liability to Chemical Bank and would issue its stock to an escrow agent, by whom it would be held until Columbia obtains SEC permission under the Public Utility Holding Company Act of 1935 to acquire the stock (Art. IX, Sec. 2, App. 34b);

(h) consummation of the foregoing transactions, together with preliminary transactions (concentration of all properties in the hands of the Inland Trustee, liquidation and dissolution of certain of the subsidiaries

of American, establishment of reserves and accounts for payment of claims, etc.) according to a specified and detailed program (Art. IX, Secs. 1, 2, 4, App. 32b, 34b, 36b).

Referring item by item to our summary of the Trustees' Plan, the Kern proposals would:

(a) Eliminate the statement of principles in the Trustees' Plan (the proposals being inconsistent with those principles) (Art. I, Sec. 2 deleted by Kern proposals, App. 5b).

(b) Eliminate the valuation on which the Trustees' Plan is based; the proposals do not state the valuation on which they are based, but refer to the Trustees' valuation and the testimony of higher valuation which was rejected by the District Court (Kern Art. V, Sec. 3, App. 20b).

(c) Eliminate any findings as to the solvency or insolvency of the Debtors (Art II, Sec. 2 deleted by the Kern proposals, App. 6b).

(d) Eliminate the unsecured borrowing of $4,000,000 from Chemical Bank and substitute three series of mortgage securities (Series A Sinking Fund Bonds, Series B Convertible Bonds, Series C Sinking Fund Note) in aggregate principal amount of $4,250,000 (Kern Art. VII, Sec. 2, App. 23b).

(e) Eliminate the provision for payment of claims by the Trustee, and substitute a provision for their payment by the New Company to be organized to carry out the Plan (Kern Art. VIII, App. 30b).

(f) Eliminate the provision for reservation by the Trustees of funds to pay Class 1 claims (including distributions heretofore ordered; and reorganization fees and expenses), and substitute a provision for the as-

sumption by the New Company of liability to pay them (Kern Art. IX, Sec. 4, App. 36b).

(g) Instead of transferring to the New Company physical properties and cash balances *after* reservations by the Trustees for payment of claims and reorganization fees and expenses, the Kern proposals would transfer all physical properties and *all* cash balances to the New Company (Kern Art. VII, Sec. 1, App. 23b).

(h) Eliminate the specified and detailed consummation program and substitute therefor a general provision that the Kern proposals are to be consummated "in accordance with" the statute (Kern Art. IX, Sec. 1, App. 35b).

Under the Kern proposals, the capitalization of the new company would have been $4,250,000 aggregate principal amount of the three series of sinking fund or convertible mortgage securities and $4,765,160 par value of common stock, or a total capitalization of $9,015,160. The Sinking Fund Bonds and the Convertible Bonds would be sold to two insurance companies and the Sinking Fund Note to a banking institution. The common stock ($4,765,160) would be (a) issued to public holders of Kentucky Bonds and Debentures ($3,265,160), (b) offered for sale to such holders ($694,650), and (c) sold outright to the underwriters ($805,350). The underwriters also would have purchased from holders of Kentucky Bonds and Debentures, at par, such of the common stock received by such holders under (a) or offered to them under (b) as the holders wished to sell or did not desire to purchase, respectively. An additional $470,000 par value of stock would be reserved for conversion of the Series "B" Convertible Bonds. Fees and expenses of the purchasers of the Sinking Fund Bonds, the Convertible Bonds and the Sinking Fund Note (including counsel fees) would be paid by the new company upon con-

summation of the Kern proposals. Liabilities for priority claims would be assumed by the new company. In the case of Columbia's claims, payment would be made "as funds become available" after completion of appellate review of proceedings on the Kern proposals. The amount then to be paid to Columbia would be equal to the principal of and accrued interest on its Bonds and Debentures claims against Inland and the principal of its unsecured claims against Inland. Nothing would be paid to Columbia on any of its secured and unsecured claims against American or on the Kentucky Bonds and Debentures held by it.

Considering the nature and extent of these proposed changes in the confirmed Plan, it plainly was not an abuse of discretion for the courts below to conclude that the Kern proposals were a new plan, and to refuse to begin the series of hearings and other procedures with respect to them.

3. Petitioners' Contentions

As regards this ground of the decision below, the attack of the Petition is directed solely at the principle applied by the District Court and the Court of Appeals. The main argument* is that by enactment of Section 229c in 1952,

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*The Petition includes several subsidiary contentions which can be disposed of rapidly. The substance of all of them is that the Court of Appeals erroneously believed that permissible changes in a confirmed plan do not include "changes of a material character", but only changes in "mechanical details" (Petition, pp. 13, 18). This argument is a straw-man. The statements of the District Court and the opinion of the Court of Appeals show that each court (i) recognized that the court had discretion to approve changes which materially and adversely affect creditors, (ii) cited as authority decisions holding that the court has such discretion (*Country Life, Knight* and *Prudence-Bonds*), and (iii) reached its decision, not because of any one of the "changes of material character" proposed by Kern, but because the cumulative effect of all such changes was a *plan*, not depending on anything in the confirmed Plan, and requiring still another series of hearings and proceedings covering the *entire* range of matters of which Chapter X requires consideration.

Moreover, the Petition, while quoting from *Collier* with respect to changes in a confirmed plan, gives no intimation that the editors

Congress took away a District Court's discretion to reject reorganization proposals offered after confirmation of a plan, and *required* it to start new plan proceedings on *any* reorganization proposals—even a new plan—so long as offered prior to "substantial consummation" of the Plan, as defined in Section 229a.

This argument is frivolous. Neither the terms of Section 229* nor its legislative history gives any indication that Congress intended to uproot the well-settled law that proposals to change a confirmed plan are addressed to the discretion of the court and that sound discretion requires the rejection of proposals which are a new plan. By its terms, Section 229 fixes the point in the reorganization proceedings *after* which the District Court does not have discretion to consider *any* "alteration" which materially and adversely affect the interests of creditors. It fixes as such point the "substantial consummation" of the confirmed plan. Section 229 does not purport to state anything with respect to the discretion of the District Court, *prior* to "substantial consummation", to refuse to entertain new reorganization proposals.**

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of *Collier* fully support the principles applied by the courts below, *viz.*:

> "Once a plan has been initially approved by the judge under Section 174, the opportunity has passed for proposals of new plans as such, unless the approved plan is rejected by the creditors or stockholders or fails of confirmation. Proposals submitted after approval, therefore, may be only in the nature of alterations or modifications of the approved plan.
>
> "...
>
> "All proposed changes require the approval of the district judge, and whether or not they will be incorporated in the plan rests in the exercise of his discretion which will not be reversed by an appellate court except for abuse thereof." (6 Collier, Bankruptcy, 14th Ed. § 11.11 pp. 3898-3899.)

*Section 229 is quoted in full at Pet. App. 3c.

**The purpose of Section 229 was explained in the Committee reports as follows:

> "Section 24 of the bill adds a new section 229. This section will clarify the present uncertainty as to the point in the

B. Refusal to begin new plan proceedings on the Kern proposals does not conflict with the decision of the Second Circuit in *Knight* v. *Wertheim*.

The Petition urges a conflict between the decision of the Court of Appeals and that in *Knight* v. *Wertheim*.** But consideration of the facts and opinion in that case shows that there is not such a conflict; and further that, as to the single question in this case to which *Knight* is relevant, the Court of Appeals applied the same principles which Judge Learned Hand stated and applied in *Knight*.***

The Facts in Knight

The debtor owned the Equitable Office Building in lower Manhattan. Proceedings under Chapter X were instituted April 10, 1941. The trustee filed a plan of reorganization February 24, 1944, various amendments were proposed from time to time, the plan was "approved" December 4, 1945, and "confirmed" May 13, 1946. There were not any appeals in the plan proceeding or from the confirmation order. Two months after confirmation, stockholders filed a petition which proposed an alteration of the confirmed plan.

The *plan* provided that Equitable's First Mortgage Bonds ($16,000,000) would remain outstanding undisturbed and its Second Mortgage Bonds ($3,000) would be paid in cash. Equitable's old debentures and old common stock would be treated as shown in the following tabulation:

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reorganization proceeding at which rights vest under the plan sufficiently to make it equitable to cut off *further right to amend or modify* the plan as to matters materially and adversely affecting the rights of creditors or stockholders." (House Report No. 2320 (June 26, 1952) accompanying S. 2234 (82d Cong., 2d Sess.).

**158 F. 2d 838 (2d Cir. 1946).

***The opinion of the dissenting judge does not refer to *Knight* or state a position based upon it, even though Petitioners argued at length to the Court of Appeals that the decision of the District Court was contrary to *Knight*.

Securities of the Debtor	Common Stock in the New Company
Old Debentures	
($4,754,000 principal plus $1,188,000 accrued interest)	
To be exchanged under the Plan for:	
(a) $2,852,400 New Income Bonds convertible for two years into 456,384 shares New Common Stock.	(a) 456,384
(b) 475,400 shares New Common Stock.	(b) 475,400
Old Common Stock	
(862,098 shares)	
(c) To be exchanged under the Plan 1 for 10 for 86,209.8 shares New Common Stock.	(c) 86,209.8
Total shares of New Common Stock upon conversion of New Income Bonds.	1,017,993.8

The *alterations* proposed by stockholders were: to sell pursuant to an offer of City Investing Company (a large real estate company) all of the shares of new Common Stock in items (a) and (b) above (earmarked under the Trustee's Plan for the old Debentures) and with the monies so raised, together with the debtor's liquid assets, to pay off the old Debentures' principal and interest. The provisions as to shares of new Common Stock, item (c) above, would remain as before, *i.e.*, those shares would be issued, 1 for 10, in exchange for shares of Old Common Stock. Old Common Stockholders would have a right to subscribe for the shares of new Common Stock in items (a) and (b) (except for 69,686 shares to be received as a commission by City Investing Company under its offer). The new Con-

vertible Income Bonds would be eliminated from the plan. No other change in the trustee's plan was proposed.

The District Court rejected the proposal on the ground that its confirmation order ought to be final.

The Decision in Knight

The Second Circuit reversed this decision. The quotations from Judge Learned Hand's opinion set forth above (pp. 21-22) reflect the principles which it applied with respect to the stockholders' proposal to alter the confirmed plan—*viz.*, that (i) such proposals are addressed to the discretion of the court, to be exercised upon consideration of "the whole nexus of facts", and (ii) discretion should be exercised against proposals which require changes in the confirmed plan "so radical" that they amount in substance to a new plan. Clearly, there is not any conflict between these principles and those applied by the Court of Appeals in this case, which it stated as follows:

> "We think the district court did not abuse the discretion expressly granted him by the statute; but, on the contrary, we consider that he used sound common sense, practical judgment in declining to permit an altogether new plan to be submitted, under the guise of alterations and modifications, in lieu of a sound plan already confirmed by him and approved by this appellate court, with certiorari denied by the Supreme Court of the United States."

Neither is there a conflict with respect to the decisions that the proposal in *Knight* was not a new plan but that the Kern proposals are. The statement of the *Knight* plan and "alterations" above shows the limited scope of the "alterations" proposed in *Knight*, and the *Knight* opinion expressly relies upon the limited scope of the "alterations".*

*In rejecting the argument that the stockholders' proposals were a new plan, Judge Hand stated:

The *Knight* "alterations" did *not* involve, as did those proposed by Kern, (i) the issuance of classes of securities not provided for in the plan, (ii) changes in the amounts of securities provided for by the plan, (iii) changes in the property to be transferred to the reorganized company, (iv) changes in the method of payment of claims, (v) elimination of the consummation procedures set forth in the plan. Neither did they involve, as did the Kern proposals, the elimination of plan principles, the elimination of findings of insolvency, a new valuation, and the redetermination of substantive rights of creditor classes. In view of these facts, the statement in the Petition that "if the alterations presented in this case constitute a 'new' and 'completely different plan', this was no less true in *Knight*", is preposterous.

Petitioners refer frequently (Pet. 11, 12, 21) to Mr. Justice Reed's opinion granting a stay in the proceedings which eventuated in the *Knight* decision, *viz.*, *In re Equitable Office Bldg. Corp.*, 72 Sup. Ct. 1086 (1946, not officially reported). Mr. Justice Reed in that opinion also emphasized that the proposals there did not basically alter the trustee's plan, stating at p. 1089:

> "Under the stockholders' present proposal they would receive immediately the *same* number of

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> "... Nor were the proposed changes themselves so radical as to fall within our decision in Country Life Apartments v. Buckley, supra. The first mortgage was *to remain as before*; the balance upon the second mortgage was to be *paid as before*; a new corporation was to be organized with the *same* capital as before; the old shareholders were to have the *same* number of new shares as before; the current liabilities were to be *paid as before*. The *only change* was that the debenture bonds were to be paid in cash instead of refunded in new bonds and new shares, and that to do this the shares which had been reserved for them, either immediately, or to answer their conversion privilege, were to be sold to the old shareholders, taken up by the City Investing Company, or were to go to that company for its underwriting commission." (158 F. 2d at 843)

shares as under the trustee's plan. The reorganization corporation would have the *same* number of shares. 862,096 of the shares allotted the present debenture holders would be taken by the underwriter at $6 per share. This money and corporation cash would pay all debts and expenses. If the value of the property remains at $21,375,000 the book value per share would be the *same*."

CONCLUSION

The Petition for Writ of Certiorari (No. 809) should be denied.

Respectfully submitted,

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April 19, 1960.

APPENDIX

Some Comments on the Excerpts from the Address by J. Arnold Pines, Appendix C to Petition

Mr. Pines stated at the outset of his address* that "his area of responsibility, as Chief Financial Analyst of the Division of Corporate Regulation of the SEC, extends to three statutes", one of which is Chapter X of the Bankruptcy Act. Accordingly, his address expresses views on a matter still in litigation lying squarely within his area of responsibility at SEC, namely, the proceedings in which the Petition now seeks certiorari. Mr. Pines' address expresses a point of view which counsel for the SEC, as well as counsel for the Petitioners, had urged to the District Court and the Court of Appeals, and which, when he delivered the address, had been rejected by both Courts.

We do not object to Mr. Pines expressing to the Rutgers Business School his dissatisfaction with court decisions adverse to his views in his official position. Considering, however, that the Courts below have rejected such views, for the Petition to treat Mr. Pines' view as some sort of authority seems to us bizarre.

We limit our comments below to those statements in Mr. Pines' address which concern valuation.

I.

". . . the Inland estate increased in value far beyond expectation, . . . " (Pet. App. 24c.)

This refers to the fact that the 1969 stock market valuation, derived from the capitalization envisaged by

*Mimeograph made available by SEC, p. 1 (not included in the Kern Petition's excerpts).

Kern's proposed underwritings, was higher than the reorganization value as of December 31, 1957, which was based on discounting future earnings and was found fair by the District Court in the spring of 1958 (affirmed by the Court of Appeals).

This is measuring one kind of valuation against another.

If one limits the inquiry to a comparison of stock market valuations, that involved in the Kern proposals should be compared with the stock market valuation made by Kern's expert witness in the hearings on the Trustees' Plan.* Comparing these two, there was a substantial *decrease* (not an increase) between 1957 and 1959 in stock market value. (Mr. Pines' address does not refer to the earlier stock market valuation.)

If one limits the inquiry to reorganization value based on estimates of earnings, it is known that actual earnings for calendar year 1958 (*i.e.*, the year between the date of the Trustees' valuation (as of December 31, 1957) and the 1959 Kern proposals) were substantially less than earnings for the year 1957, and that total revenues were substantially *less* than those estimated by the Trustees' expert as a basis for the Trustees' valuation.** There was, of course, a

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*Appendix to Brief of Appellant Paul E. Kern is the United States Court of Appeals for the Sixth Circuit, September, 1958 (Nos. 13657, 13660), filed as part of the record before this Court in Paul E. Kern, *Petitioner*, v. The Columbia Gas System, Inc. et al., *Respondents*, No. 766, October Term, 1958, pp. 134a-172a.

**Detailed Analysis, Inland Gas Corporation, by L. E. Kihlken, February 13, 1958, filed as part of the record before this Court in Paul E. Kern, *Petitioner*, v. The Columbia Gas System, Inc., et al., *Respondents*, *supra*.

The Trustees' 1958 earnings reports are not in the record here; however, they were in the record before the District Court and the Court of Appeals, and these reports were summarized in our brief to the Court of Appeals. We do not know whether Mr. Pines, as Chief Financial Analyst, was familiar with this brief, but counsel for Petitioners obviously were.

substantial increase in the Trustees' cash during the period between the December 31, 1957 Trustees' valuation and the Kern 1959 proposals; this would naturally result (and it was foreseen that it would result) in some increase in reorganization value, although not exactly equal in amount to the increase in cash.

II.

> "... the valuation submitted on behalf of the Trustees' plan was more than $3,500,000 less than the amount at which sophisticated institutional investors and underwriters, only one year later, agreed to purchase the enterprise. ..." (Id.)

The "only one year later" phrase is an inaccurate description of the period between the Trustees' valuation and the submission of the Kern proposals. The Trustees' reorganization valuation was as of December 31, 1957; the Kern proposals were submitted in May 1959 and specified as their target date August 31, 1959 (which Mr. Pines himself, on an earlier page, has recognized as the date of the stock market valuation, Pet. App., 23c). Even as of that date the Kern stock market valuation counted on the advantage of postponing for a substantial, though indefinite, period many of the obligations which the Trustees' Plan regards as obligations for which a plan should make immediate provision.

In a reorganization such as this, in which cash generation from trustee's operations is about $1,000,000 for each year reorganization is delayed, it obviously makes a substantial difference that the period between the Trustees' valuation and the Kern stock market valuation was 20 months, rather than the 12 months stated by Mr. Pines. But even more important is the fact that "sophisticated institutional investors and underwriters" did not (whatever

the elapsed time) "agree to purchase the enterprise". They indicated a willingness for a limited period and subject to a number of contingencies, to purchase securities of the reorganized company. In estimating value there is a necessary and obvious difference in the relative probative weights of (a) an offer to purchase the assets of a corporation and (b) an underwriter's offer to float its securities. It is the difference between (a) an offer based on stable operational factors and not on stock market fluctuations, and (b) an offer, depending on stock market conditions, made in a volatile stock market.

III.

> "We must remember that institutional investors and underwriters are not prone to throw money away, and therefore they would hardly be likely to commit themselves to purchase the securities provided for the bondholders' proposals unless they were convinced as to the value of the underlying assets." (Id., 23c.)

No doubt the two insurance companies and the bank expected that the First Mortgage (which they required as security for the new company obligations which they might acquire under the Kern proposals) would cover underlying assets adequately protecting the $4,250,000 of mortgage securities.

But that does not take us very far in proving that value has increased (as Mr. Pines asserts) from approximately $11,000,000 to $14,500,000. If the capitalization contemplated by the Kern proposals contains anything probative of an increase in value, it must be found in the underwriting of the common stock. The inferences to be drawn from investment bankers' opinions as to common stock are obviously different from those to be drawn from insurance

company opinions of first mortgage bonds. Stock underwriters purchase with an eye to the price at which they can sell. This, as most people know, takes in a multitude of considerations other than underlying asset values and other than values appropriate for reorganization purposes. Stock-market prices sometime bear little relationship to ". . . the value of the underlying assets".

We agree with Mr. Pines that stock underwriters "are not prone to throw money away"; but his "therefore" clause is to a considerable extent a *non-sequitur*.

IV.

Mr. Pines says that, since Columbia would supposedly receive only $3,021,000 in equity value under the Trustees' Plan, one must ask why it resists the Kern proposals which will yield it much more in cash. Then he asks:

> "Can it be that Columbia does not really value the system's assets at the amount urged by the Trustees and accepted by the courts, but rather at some larger amount, perhaps approximating the value embodied in the bondholders' proposals? . . ." (*Id.* 23c.)

This in effect is an old stalking horse of Mr. Kern's. As appeal has followed appeal, Kern has each time bewailed—"But the last time Columbia said that it would receive much less in equity value than it now will." This is true; as reorganization has been repeatedly delayed by further appeals, the Trustees' operations have generated additional cash and this (though not in corresponding amounts) has tended to increase values. Values in each appeal must be related (and Columbia's briefs have in each case expressly so related them) to the valuation and financial statements in the then current record. The Trustees' Plan itself recognized that values would increase through cash accumula-

tions between the date of the Plan's valuation (December 31, 1957) and the time of final disposition of appeals from an order of confirmation, *and specifically provided for the issue of stock equal to net worth at the latter date.**

As to Mr. Pines' rhetorical questions, quoted above, Columbia had given the answer—"Yes, it did believe that the value of the equity was now more than the $3,021,000 (as of December 31, 1957) on which the Trustees' Plan was based." It had given that answer a good many months before Mr. Pines addressed the question to the Rutgers Business School students, *viz.*, in Columbia's Reply Brief dated October 3, 1959, to the Court of Appeals, pp. 11 et *seq.***

*Plan, Article VII, Sec. 2, App. 23b.

**Again, we do not know that Mr. Pines, as a financial analyst, had been informed as to the contents of Columbia's briefs; but counsel for Petitioners certainly were so informed.

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Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

No. 809

In the Supreme Court of the United States

OCTOBER TERM, 1959

PAUL E. KERN, JEROME PRINCE AND CHARLOTTE HEINE, PETITIONERS

v.

THE COLUMBIA GAS SYSTEM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 4c–20c) is not yet reported. The oral opinion (R. 66a–69a) of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1960. The petition for a writ of certiorari was filed on March 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in a reorganization under Chapter X of the Bankruptcy Act the court must set down for

hearing a proposed amendment to an unconsummated reorganization plan where the amendment would provide a sufficient increase in the estate to permit full payment in cash of the residual participant under the plan and would permit substantial participation by juniors.

STATUTES INVOLVED

Sections 222 (52 Stat. 898, 11 U.S.C. 622) and 229 (66 Stat. 431, 11 U.S.C. 629) of Chapter X of the Bankruptcy Act are set forth at Pet. 1c, 3c.

STATEMENT

This case arises out of proceedings under Chapter X of the Bankruptcy Act (11 U.S.C. 501 *et seq.*) involving the debtors Inland Gas Corporation ("Inland"), Kentucky Fuel Gas Corporation ("Kentucky Fuel"), and American Fuel and Power Company ("American Fuel").[1] Substantially all the assets involved are owned by Inland, whose stock in turn is held 72.6% by American Fuel and 26% by Kentucky Fuel.[2] Columbia Gas System, Inc. ("Columbia") owns most of the stock of American Fuel and substantial amounts of the debt securities of each of the debtors. By reason of Columbia's inequitable conduct, after gaining control of the debtors, in forcing receivership proceedings against them in order to eliminate their competition, Columbia's claims have been subordinated to those of all public creditors of the

[1] The Securities and Exchange Commission is a statutory party to the proceedings pursuant to § 208 of the Bankruptcy Act (11 U.S.C. 608).

[2] The remaining 1.4% is held by public stockholders.

debtors: *Columbia Gas and Electric Corporation* v. *United States*, 151 F. 2d 461, 468 (C.A. 6); *In re American Fuel and Power Company*, 122 F. 2d 223, 228–229 (C.A. 6); *In re Inland Gas Corporation*, 187 F. 2d 813 (C.A. 6). In effect, the public creditors of American Fuel and Kentucky Fuel were treated as "quasi-creditors" of Inland entitled to be paid out of Inland's assets prior to Columbia. *In re Inland Gas Corporation, supra*, at 817.

During the course of the reorganization proceedings, Inland's properties have greatly increased in value and out of the proceeds of the trustee's operation all of the direct creditors of Inland other than Columbia have been paid in full. Three classes of creditor remain (all figures approximate): (1) public securityholders with claims against American Fuel for $1.9 million principal and $3 million interest; (2) public securityholders with claims against Kentucky Fuel for $2.5 million principal and $4.9 million interest; and (3) Columbia, with claims against Inland for $2.2 million principal, $3.6 million interest on secured claims, and $500,000 interest on unsecured claims.[2]

In June 1958, the district court confirmed a reorganization plan based on a December 31, 1957, valuation of the enterprise of $11 million. The plan

[2] Columbia also has claims against American Fuel and Kentucky Fuel, but those claims have never been recognized as claims against Inland's assets. The only reason for treating the public creditors of the holding companies as "quasi-creditors" of Inland was to prevent Columbia from taking ahead of them; patently that principle cannot be applied to make Columbia itself a quasi-creditor of Inland as to its claims against the holding companies.

provided for payment of administration expenses and distribution of the balance as follows:

> 1. Full payment in cash of both principal and interest (total, $4.9 million) to the public creditors of American Fuel;
>
> 2. Payment in cash of principal only ($2.5 million) to the public creditors of Kentucky Fuel; and
>
> 3. Distribution of common stock valued at $3 million to Columbia on its claims for principal and secured interest totalling $5.8 million.

The Kentucky Fuel public creditors challenged the plan, contending that they were entitled to payment of their postbankruptcy interest claims of $4.9 million prior to participation by Columbia. The court of appeals rejected that contention, holding that an unsecured creditor is not entitled to postbankruptcy interest before payment of a junior (here, subordinated) creditor. *In re Inland Gas Corporation,* 262 F. 2d 510, certiorari denied, 359 U.S. 979. Since the principal and secured interest claims of the junior creditor (Columbia) were greater than the value of the balance of the estate, there was nothing left for payment on the interest claims of the Kentucky Fuel public creditors.

Shortly after the denial of certiorari from the decree confirming the plan and before any steps had been taken to consummate the plan, the Kentucky Fuel public creditors, petitioners here, presented to the district court under §§ 222 and 229 of Chapter X (11 U.S.C. 622, 629) a petition to modify the plan to take into account a $3.6 million increase in the value of the estate since the plan had been confirmed.

The proposed modification was supported by commitments of responsible bankers and underwriters to make available, through the sale of stocks and bonds of the reorganized company, over $9 million in cash. That offer, together with the cash on hand, would produce for reorganization purposes a total (as of August 31, 1959) of $14.6 million instead of the $11 million valuation on which the confirmed plan was based, and would leave a substantial surplus (some $700,000) after payment *in full* of Columbia's $5.8 million claim. To give effect to that increased value available for distribution, petitioners proposed a modification of the plan under which Columbia, instead of receiving common stock valued at only $3 million, would be paid in cash its entire $5.8 million claim (principal and secured interest) and the Kentucky Fuel creditors would receive, for their principal and in partial payment of their interest claims, the residual common stock interest in the reorganized corporation (with an option to receive cash instead of stock).

The district court, ruling only on the "legal premises" of the petition for modification (R. 78a), denied a hearing on the merits of the proposed modifications for the reason that the modifications "are predicated solely on an asserted right on the part of the public holders of Kentucky bonds and debentures to post-bankruptcy interest * * * and that such asserted right has already been adjudicated adversely to [them] * * *, and also, that said Amendments and Modifications are not congruent with the Plan, for the reason, among others, that they are based on principles

contrary to the principles of the Plan, and contrary to the principles established by the Court of Appeals in these proceedings". (R. 77a–78a). The court of appeals, with Judge Miller dissenting, affirmed (Pet. 4c–20c).

DISCUSSION

After confirmation but before consummation of a Chapter X reorganization plan, responsible bankers tendered underwriting commitments that would make available for distribution to creditors over 30% more value than the valuation on which the plan was based ($14.6 instead of $11 million) and would leave a surplus after payment in full of all the claims given recognition in the confirmed plan. The question is whether the district court can refuse to consider modifications to the plan proposed by junior claimants, previously denied participation because of the insufficiency of the estate, to make appropriate disposition of the newly-arisen surplus.[4]

[4] Petitioners, the Kentucky Fuel creditors, contend that their interest claims are next in line and that they would be entitled to the surplus after payment to Columbia on its claims against Inland. While we agree with that contention, the important question here is not who is entitled to the surplus but whether the district court can refuse to provide for its disposition at all, allowing it to go as a windfall to whoever happened to have the residual stock interest in the earlier plan based on an outmoded valuation. It may be noted, however, that Columbia's contention that its remaining claims against the holding companies (see note 3, *supra*) would in any event be prior to the Kentucky Fuel creditors' interest claims is not only unsound as between those two claimants (see note 7, *infra*) but wholly ignores the existence of the public stockholders of Inland (see note 2, *supra*) who would necessarily share with the holding companies in any participation upon Inland stock.

1. Because substantial, and sometimes startling, increases in the value of a debtor's assets during the course of reorganization are common,[5] the question here is of broad and continuing importance. To a degree, of course, all going enterprise valuations are uncertain and mathematical precision in assuring that no creditor participates beyond his claim and that junior creditors participate in the precise degree that the "true" value of the estate allows is impossible. That, however, makes it all the more important that, to the extent practical and without disturbing vested rights, original estimates of value be revised when subsequent experience shows them to be erroneous and the

[5] See, *e.g.*, *Chase* v. *Austrian*, 139 F. 2d 555 (C.A. 4) (increase from $1.3 to $38 million during 8-year reorganization); *Chemical Bank Co.* v. *Investors*, 343 U.S. 982, 984 (annual earnings of railroad $18 million greater than original estimate). In numerous instances, the obligor has become solvent during reorganization. *E.g.*, *Knight* v. *Werthein & Co.*, 158 F. 2d 838 (C.A. 2); *In re Central States Electric Corporation*, 112 F. Supp. 281 (E.D. Va.), affirmed, 206 F. 2d 70 (C.A. 4); *In re Macomb Trailer Coach* v. *McInnis*, 200 F. 2d 611 (C.A. 6); *Standard Gas & Electric* v. *Deep Rock Oil Corp.*, 117 F. 2d 615 (C.A. 10); *Standard Gas & Electric Co., et al.*, 36 S.E.C. 247, 255. For other examples of substantial increases, see *In re Hotel Realty Co.*, 69 F. Supp. 345, 346 (D. N.J.); *In re National Food Products Corp.*, 23 F. Supp. 979, 984 (D. Md.); *In re Deep Rock Oil Corp.*, 113 F. 2d 266 (C.A. 10); *In re Midland United Co.*, 58 F. Supp. 667 (D. Del.); *In the Matter of Third Avenue Transit Corp.*, Civil Action Nos. 85851, 86410, 86412, 86413, 86537 (unrep.) (S.D.N.Y.); *In re Childs Company*, 69 F. Supp. 856 (S.D.N.Y.); *The United Corporation*, 13 S.E.C. 854, 878 and 35 S.E.C. 645, 648; *International Hydro-Electric System*, Holding Company Act Release No. 14080 (October 26, 1959); *In re Northern States Power Company*, 80 F. Supp. 193, 197 (D. Minn.); *Standard Power and Light Corp.*, 37 S.E.C. 1, 11; *Interstate Power Company*, 32 S.E.C. 239; *Missouri Pacific R. Co. Reorganization*, 290 I.C.C. 477, 627.

proposed distributions based on them to be inequitable. As put by Mr. Justice Frankfurter in *Bondholders, Inc.* v. *Powell,* 342 U.S. 921, 925:

> * * * All valuations based on estimates of future earnings are bound to be guesses in the sense of reaching into the future. That is a reason against, not for, turning guesswork into dogma and a reason for correcting bad guesses as much as is reasonably practical by hindsight. * * *

2. That the plan has been confirmed does not preclude the proposed modification, for under the statute it is consummation, not confirmation, of a reorganization plan that creates vested rights and precludes further substantial alterations. Section 222 of Chapter X provides that a reorganization plan:

> * * * may be altered or modified, with the approval of the judge, * * * before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration * * * of such alteration or modification. * * *

Section 229 defines substantial consummation and provides that:

> When a plan has been substantially consummated * * * the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

In short, changes which "materially and adversely" affect the creditors can be made only before consummation and only upon a hearing, while lesser changes can be approved by the judge without a hearing and may be made even after consummation. As to neither kind of change, however, is any distinction made because of confirmation; the only event that affects the power of modification is consummation.

We may assume that the modification proposed by petitioners "materially and adversely" affects Columbia within the meaning of §§ 222 and 229 and hence could not be made after substantial consummation or without a hearing. But consummation has not occurred and petitioners do not seek modification without a hearing. Hence there is no question of the power to make the modification under the statute, and the only question is whether petitioners have established a sufficient change of circumstances to warrant modifying the plan. The changed circumstance here, established at least *prima facie*, is a 30% increase in the value of the estate, producing a surplus over the claims of the participants in the plan and making possible a distribution to junior creditors who are now denied any participation. If ever a material modification can be made after confirmation of the plan, which the statute expressly contemplates and authorizes, a more compelling case for such a modification is difficult to visualize.

3. Notwithstanding the seemingly clear statutory language, the court below held that petitioners were not entitled to a hearing on their proposed modifica-

tion. The basis for its decision is not clear, but none of the possible explanations is supportable:

a. At one point the court seems to say that after confirmation the court can make only "such changes as will better aid in carrying out the plan which has been finally confirmed" and not "such changes or modifications as will materially alter the property rights established by the decree of confirmation" (Pet. 10c).[6] That statement flies in the teeth of the statute which makes consummation, not confirmation, the cut-off date; before that, the only difference between material and immaterial changes is in the requirement of a hearing, the statute expressly authorizing either kind of modification to a plan "before or after its confirmation."

b. Enumerating the differences between the plan and the proposed modifications in their technical details (the mechanism for payment of reorganization fees, the terms of the bond issues, etc.) and in the payment of Columbia in cash rather than stock, the court concludes that the proposals are more than "alterations and modifications" and constitute an "altogether new and different" plan (Pet. 6c). It

[6] The court relied on *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 141 F. 2d 65 (C.A. 7). That case involved, however, a modification proposed after *consummation*, and the restrictive interpretation of § 222 there adopted to avoid upsetting consummated plans may have been justified by the lack of any statutory cut-off point short of the final decree. Section 229, however, was added in 1952 for that very purpose and thus undermines the basis for that decision. *Prudence-Bonds Corp.* v. *City Bank Farmers Trust Co.*, 186 F. 2d 525 (C.A. 2), also relied on by the court below (Pet. 11c), was similarly a pre-§ 229 case involving a post-consummation modification.

is hardly conceivable, however, that a financing which will produce $14.6 million for reorganization purposes would be in terms identical to one producing only $11 million or that a plan can be modified to provide for an added 30% of distributable values without some modification in the allocation of the residual stock interest. The modifications proposed here do no more than the minimum necessary to account for the increased value, and the holding that those changes go beyond permissible "modifications" means in effect that no plan can ever be modified to reflect subsequent increases in value.

Patently, we think, if the distinction between a "new" plan and an "alteration" to an existing one adds anything to the restraints imposed by the law of the case—which may, indeed, be questioned—the distinction must be made in terms of the substantial interests affected by the changes, not by an arithmetical adding up of the number of clauses in the plan that have to be rewritten. In those terms the modification here is fully consistent with the principles established by the prior rulings and embodied in the confirmed plan. It preserves fully the priorities and order of participation previously established and simply takes account of an increase in value not provided for by the confirmed plan. As valued for purposes of the plan, the assets were inadequate to pay Columbia in full on its claims, so that Columbia became the residual participant entitled to the common stock. The proposed modification makes available more than enough to pay Columbia in full in cash and leaves a residual participation for the creditors next

in line. No other substantive change is involved, and it is not apparent how that change results in an "altogether new" plan in any meaningful sense.

c. The court also asserts that the proposals "constitute an attempt to relitigate matters previously decided by this court" (Pet. 13c). All that was previously decided, however, was that the Kentucky Fuel public creditors were not entitled to payment of postbankruptcy interest *prior* to payment of principal and secured interest on the subordinated claims of Columbia; the claim now made is that the estate has so grown that there is a residue left *after* payment of Columbia's prior claims and that petitioners' interest claim is now next in line.[7]

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[7] If the court's opinion be read as extending its prior holdings that postbankruptcy interest in not payable prior to payment of junior creditors to a holding that postbankruptcy interest is not payable even after all other creditors have been paid in full, the decision is even more clearly erroneous and is in direct conflict with the numerous decisions recognizing the "solvency exception" to the disallowance of postbankruptcy interest—*i.e.*, the rule that postbankruptcy interest must in all events be paid before any distribution is made to the bankrupt or its stockholders. *E.g.*, *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U.S. 261, 266–267; *New York* v. *Saper*, 336 U.S. 328, 330 n. 7; *Johnson* v. *Norris*, 190 Fed. 459, 463 (C.A. 5), appeal dismissed for lack of jurisdiction, 232 U.S. 715; *Littleton* v. *Kincaid*, 179 F. 2d 848, 852 (C.A. 4); *United States* v. *Bass*, 271 F. 2d 129, 130 (C.A. 9); *Marcalus Mfg. Co.* v. *United States*, 169 F. Supp. 821 (Ct. Cl.).

It is clear from the court's earlier opinions that the original disallowance of postbankruptcy interest to the Kentucky Fuel creditors was based solely on an application of the general bankruptcy interest rules. 241 F. 2d 374, certiorari denied, 355 U.S. 838; 262 F. 2d 510, certiorari denied, 359 U.S. 979. Columbia nevertheless contended below that, instead of applying the general interest rules, the court in its earlier decisions had lim-

d. Finally, the court at one point phrased its conclusion as being that the district judge "did not abuse the discretion expressly granted him" by the provision of § 222 allowing modification proposals to be filed only "with his approval" (Pet. 9c). In fact, however, the district court purported to rule only on the "legal premises" of the proposed modification (R. 78a), and the grounds for its decision were precisely the same as the other grounds relied on by the court of appeals—namely, that the proposal was an attempt to relitigate the previous denial of postbankruptcy interest to petitioners and that it constituted a "new" plan entirely inconsistent with the confirmed one and hence was not permissible under the terms of the statute. Nor does the court of appeals allude to any considerations on which a discretionary refusal to entertain the proposals might properly have been based.

3. The decision below is in conflict with the decision of the Second Circuit in *Knight* v. *Wertheim*, 158 F. 2d 838. In that case a reorganization plan had been confirmed under which the debenture holders

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ited the Kentucky creditors' participation as "quasi-creditors" of Inland to their principal claims simply as a matter of equity. Not only is that contention not supported by anything in the prior opinions, but such a ruling would have been inconsistent with the court's original finding that it was impossible to measure the extent of the damage caused the public creditors by Columbia's inequitable conduct. 151 F. 2d 461, 469. The contention is also disproved by the allowance of postbankruptcy interest to the public creditors of American Fuel, to whom precisely the same equitable principles were applied (the only difference being that the claims of the American Fuel creditors were secured, entitling them to interest before the payment of junior creditors under the general interest rules).

were to receive convertible income bonds for part of their claims and stock for the balance, with the stockholders also receiving a small amount of stock. Thereafter, the stockholders, claiming a large increase in the value of the property, proposed an alteration, supported by an underwriting offer, under which the stock of the new company would be sold to the old stockholders for sums sufficient to pay off in full the claims of the debenture holders, leaving the stockholders with the entire equity. The modification was opposed by the debenture holders—"as was readily understandable, since the price of the bonds had risen far above the amount of principal and interest" (158 F. 2d at 841)[8]—and, after extensive hearings, was rejected by the district court. The court of appeals, in an opinion by Judge Learned Hand, reversed, finding in § 222 ample authority for a post-confirmation modification to account for an unforeseen increase in the value of the estate and holding that none of the considerations urged justified denial of the proposal as a matter of discretion. That a plan had been finally confirmed after long years of delay was not a sufficient reason to deny the modification, since the debenture holders, who would be given interest until payment, would not lose anything they were entitled to by a further delay. And since the proposed modification guaranteed the senior claimants principal and interest

[8] So, also, Columbia's opposition here to a proposal to pay its claims in full in cash can be explained only on the ground that the present plan does in fact give it more than the total amount of its claims.

on their claims—"all the rights that a court need regard" (158 F. 2d at 843)—there was "no reason for depriving the shareholders of whatever chance might remain of realizing upon their property" (158 F. 2d at 843).

The only distinction that the court below was able to suggest between this case and *Knight* was that the alteration proposed there was more "simple" than that proposed here (Pet. 11c). In what substantial way the two alterations were different, however, the court was unable to say. Both cases involved neither more nor less than a proposal by junior claimants, made possible by a substantial increase in the value of the estate and supported by underwriting offers, to pay off the senior claimants in cash and take the residual equity for themselves. The cases are identical in all material respects,[9] and the decisions can be explained only as reflecting fundamentally different concepts of the duty of a reorganization court to modify an unconsummated plan when a substantial increase in the value of the property has made the original plan inequitable.

4. The court below emphasized the long duration of the reorganization proceeding in this case and the extensive litigation it has produced. The past

[9] The identity extends even to the fact noted below that the commitments of the underwriters have expired (Pet. 8c–9c, 12c), for the offer had similarly expired in *Knight*. Judge Hand's answer is equally applicable here (158 F. 2d at 842):

> * * * We cannot say on this record that the value of the debtor's property has so fallen in the past six months that the equity has for practical purposes disappeared; and indeed the strong resistance of the debenture holders to the appeal suggest that it has not.

history of the case, however, only emphasizes the anomaly of the court's present decision, for the very reason for the past delays has been a continuing increase in the value of the estate necessitating successive revisions of proposed plans to give junior creditors the benefit of the augmented estate. And it is particularly inappropriate that the specter of delay should be invoked in favor of Columbia, for it is only because of the extended delay that Columbia itself has become entitled to participate in the reorganization. Only six years ago a plan was approved under which Columbia was to receive nothing and the residual estate was to have gone to petitioners on their claims for principal. *In re Inland Gas Corp.*, 211 F. 2d 381 (C.A. 6). A subsequent increase in the value of the estate, however, produced a surplus available to Columbia on its subordinated claims and required substitution of the plan that has now been confirmed. Obviously that delay has been not prejudicial, but dramatically beneficial, to Columbia, and it is only petitioners—who are to be given no interest for the period during which the distribution to them was delayed for Columbia's benefit—who have been prejudiced. Moreover, in contrast to the denial of interest to petitioners during the delay beneficial to Columbia, the modification now proposed gives Columbia interest to the date of payment on the bulk of its claims (its secured claims), so that any further delay required to effect those modifications will not substantially prejudice Columbia. And since all the other creditors have already been paid in full (in-

terest as well as principal) on their claims,[10] there is no one else who can be affected by a delay.

In still another way the 30-year duration of these proceedings counsels for, rather than against, this final modification. Because of the inequitable conduct of Columbia precipitating bankruptcy, the public securityholders of Kentucky Fuel have had to wait 30 years for a return of their principal, and they remain the only class of creditors that has been denied interest for that period. It now appears that the estate is sufficient so that they too may be at least partially compensated for that delay, and that is the purpose of the proposed modification. That the delay, and hence the injury, has been great simply affords all the more reason for not forcing termination of the proceedings at the very point at which it becomes possible to provide a remedy for that delay, particularly where the result is to give a windfall to the adjudged wrongdoer ultimately responsible for the proceedings.

[10] The public securityholders of American Fuel, the last remaining class of creditors other than petitioners and Columbia, were paid during the pendency of the appeal in this case by agreement of the parties, their claims being unaffected by the proposed modification.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APRIL 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960

FILE COPY

Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 809

IN THE

Supreme Court of the United States

October Term, 1959

PAUL E. KERN, JEROME PRINCE, and CHARLOTTE HEINE, *Petitioners*,

v.

THE COLUMBIA GAS SYSTEM, INC., et al., *Respondents*.

BRIEF OF RESPONDENT BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 31, 1960

STANDARD PTG. & PUB. CO., LAW PRINTERS, HUNTINGTON, W. VA.

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ABBREVIATIONS

American:	American Fuel & Power Company, one of the Debtors.
American Notes:	Five-Year 7% Convertible Gold Notes, due July 1, 1934, of American Fuel and Power Company.
American Trustee:	Clinton M. Harbison, Trustee of American Fuel & Power Company.
Columbia:	The Columbia Gas System, Inc., formerly Columbia Gas & Electric Corporation.
Debtors:	Inland Gas Corporation, American Fuel & Power Company, and Kentucky Fuel Gas Corporation.
Inland:	Inland Gas Corporation, one of the Debtors.
Inland Bonds:	First Mortgage 6½% Sinking Fund Gold Bonds of Inland Gas Corporation.
Inland Debentures:	Second Mortgage 10-Year 7% Sinking Fund Debentures of Inland Gas Corporation
Inland Trustee:	Ben Williamson, Jr., Trustee of Inland Gas Corporation

Kentucky:	Kentucky Fuel Gas Corporation, one of the Debtors
Kentucky Bonds:	First Mortgage 6½% Sinking Fund Gold Bonds of Kentucky Fuel Gas Corporation
Kentucky Debentures:	10-Year Convertible 6½% Sinking Fund Gold Debentures of Kentucky Fuel Gas Corporation
Kentucky public creditors:	The holders of Kentucky Bonds and Debentures, other than Columbia Gas System, Inc.
Postbankruptcy interest:	Interest accruing after institution of equity receivership proceedings for each of the Debtors
Prebankruptcy interest:	Interest unpaid at date of institution of equity receivership proceedings for each of the Debtors

Emphasis has been supplied to quotations in which emphasis appears.

No. 809

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BRIEF OF RESPONDENT BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Counterstatement of Questions Presented

Under the heading "Questions Presented" Petitioners state two questions. Neither is presented by the decision of the Court of Appeals.

The decision *was not,* as Petitioners say in their first question, that a District Court "may refuse to hear, prior to consummation of a confirmed plan, a proposed *alteration* * * * " of that plan. The decision *was* that after a plan has been confirmed, a District Court should decline to permit a new plan (however disguised) to be filed, even though the confirmed plan has not yet been consummated. In determining when proposed changes are "alterations and modifications" and when they amount to a new plan, the proper exercise of discretion by the District Court

under Section 222 of the Bankruptcy Act is necessarily involved. In the instant case the Court of Appeals held that the District Court properly exercised its discretion in this respect. Therefore, we re-state the question presented as follows:

> **Did the District Court abuse its discretion when, in a corporate reorganization proceeding under Chapter X of the Bankruptcy Act, after confirmation of a plan but prior to consummation, it rejected so-called "Alterations and Modifications" which changed all material provisions of the plan and which the District Court expressly found to be not congruent with the plan but to constitute a new plan?**

Petitioners' second question involving the right of Kentucky creditors to postbankruptcy interest from Inland's assets arises only as part of a new plan. The District Court properly declined to permit a new plan to be filed after confirmation. Therefore, this question is not presented on this record.

Counterstatement of the Case

These proceedings have been in court since December 2, 1930, first as an equity receivership, afterwards as proceedings under Section 77B of the Bankruptcy Act, and finally as corporate reorganization proceedings under Chapter X of the Bankruptcy Act. The affairs of the debtor corporations and the history of these proceedings are fully disclosed in the opinions of the Court of Appeals in the eleven decisions listed in the majority opinion in the instant case (Pet. App. B, p. 5c). Furthermore, this Court has more than a passing acquaintance with these proceedings, having denied numerous petitions for writs of certiorari and petitions seeking rehearing on the denial of a petition for writ of certiorari and having once granted certiorari. *Vanston v. Green*, 329 U.S. 156.

It may be convenient, however, to review a few facts. Inland and Kentucky were incorporated for the purpose of engaging in the production, transportation, and sale of natural gas in eastern Kentucky. American was intended primarily as a holding company. It owned 72.6% of the stock of Inland and 91.12% of the stock of Kentucky. Each company had substantial issues of debt securities, which were in default in 1930. Among others were Kentucky bonds (principal $2,236,600, interest to December 31, 1957, $3,644,645)* and Kentucky debentures (principal $542,000, interest to December 31, 1957, $971,760)*. Kentucky's assets are less than $10,000. Consequently, the Kentucky bonds and debentures would be worthless but for the decision of the Court of Appeals that holders of Kentucky bonds and debentures are quasi creditors of Inland to the extent of principal and pre-bankruptcy interest, but not postbankruptcy interest (187 F. 2d 813; 241 F. 2d 374; 262 F. 2d 510). Columbia's secured claims against Inland are principal $2,143,467, interest to December 31, 1957, $3,199,519. It also holds unsecured claims against Inland and large claims against American and Kentucky. By prior decisions of the Court of Appeals, all of Columbia's claims were subordinated to the claims of all other creditors of Inland.

The principal petitioner here, Paul E. Kern, was not an original investor in the Kentucky bonds and debentures, but bought them from time to time during the course of these proceedings, principally in 1952, 1953, and 1954, until he owns thirty-four per cent of the outstanding bonds and some debentures.* (241 F.

---

* Not including bonds and debentures owned by Columbia.

2d 374, 376. See also the majority opinion in the instant case, Pet. App. B p. 6c.)

In recent years various plans of reorganization have been under consideration and much time has been spent in efforts to formulate a plan which would be fair and equitable and feasible and to the best interests of the creditors, but, notwithstanding all such efforts, it has thus far been impossible to consummate a plan.

In 1952 a plan, prepared by the Trustees, was under consideration by the District Court, when Kern asserted several claims in behalf of Kentucky against Inland and American and demanded the appointment of a new trustee for Kentucky and independent counsel for the Kentucky trustee. The claims asserted by Kern were almost identical to claims that previously had been presented on behalf of Kentucky and which the District Court had rejected. Nevertheless the District Court again heard and again adjudicated these claims asserted by Kern, and, by an order entered October 6, 1952, denied such claims and denied Kern's request with respect to the Kentucky trustee and his counsel. Kern appealed to the Court of Appeals from such adjudication, and the order of the District Court was affirmed December 4, 1953 (208 F. 2d 13). The delay resulting from this appeal was approximately fourteen months.

Hearings then proceeded in the District Court, with the result that, by an order entered February 12, 1953, a plan of reorganization, identified as "Plan of Reorganization dated February 12, 1953," was found to be fair and equitable and feasible. Kern appealed, his principal contention being that the public creditors of Kentucky were entitled to *pari passu*

treatment with the public creditors of American. The Court of Appeals affirmed on March 18, 1954 (211 F. 2d 381). Kern then filed a petition for a writ of certiorari, which was denied October 14, 1954 (348 U. S. 840). This round of appeals consumed approximately nineteen months and prevented any reorganization during that period. Although the finding of the District Court that the plan of reorganization of February 12, 1953, was fair and equitable and feasible was affirmed by the Court of Appeals, delay resulting from appellate litigation prevented the confirmation and consummation of that plan.

In 1955 lengthy proceedings were conducted in the District Court with respect to a plan of reorganization based on a proposed cash sale. This plan was found by the District Court to be fair and equitable and feasible in December, 1955. Kern promptly noted an appeal. The Inland Trustee moved the Court of Appeals to dismiss that appeal on the ground that it was frivolous and taken merely for the purpose of delay. Prior to the decision of the Court of Appeals on that motion, Kern withdrew his appeal.

Early in 1956 the sale plan of reorganization, based upon a proposed cash sale to Tennessee Gas Transmission Co., was submitted to the Kentucky public creditors for acceptance. Kern, however, bitterly opposed acceptance and circularized other owners of Kentucky securities, and by this means and by his ownership of Kentucky bonds, which at that time had risen to 34% of those publicly held, was able to veto that plan. The American Trustee moved the Court to confirm the plan despite Kern's veto, but the Court refused. One of the reasons for the refusal was

that the plan provided for postbankruptcy interest to the public holders of Kentucky bonds and debentures, and the District Court held that they were not entitled to postbankruptcy interest from Inland's assets.

The District Court's order was entered on March 14, 1956. Kern and others appealed from that order. On appeal, the District Court's order was affirmed February 14, 1957 (241 F. 2d 374). Kern and others filed petitions for rehearing, which were denied. Petitions for writs of certiorari were then filed, which were denied October 14, 1957 (355 U. S. 838). Kern, on November 1, 1957, petitioned this Court for a rehearing of the denial of his petition for a writ of certiorari, and that petition was denied November 18, 1957 (355 U. S. 879). This round of appeals consumed another nineteen months, during which time all efforts to reorganize the Debtors were of necessity suspended. Meanwhile, the offer of Tennessee Gas Transmission Company to purchase the Debtors' properties was withdrawn, and no similar offer could be obtained by the Trustees. Thus any chance of a plan of reorganization based upon a cash sale was lost.

The order of the District Court entered March 14, 1956, which was affirmed by the Court of Appeals as above stated, directed the Inland Trustee and the American Trustee "* * * to prepare and file a new plan of reorganization which will eliminate the recovery of postbankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation." And from the Bench the District Court directed that the new plan be submitted for acceptance to Columbia only. As soon as appellate review, as mentioned above, was completed, the two Trustees began the preparation of a new plan,

as directed by said order. The new plan, called "Plan of Reorganization dated February 25, 1958, as Amended," was duly filed in the District Court, and, after appropriate hearings, that Court entered an order May 13, 1958, finding the Plan to be fair and equitable and feasible, and, after further appropriate proceedings, that Court entered an order on June 2, 1958, confirming the plan.

Kern and others appealed from the orders of May 13, 1958, and June 2, 1958. Shortly thereafter the American Trustee moved the Court of Appeals to dismiss all such appeals as frivolous and taken merely for the purpose of delay. The Inland Trustee supported that motion. After comprehensive briefs were filed and after oral argument, the Court of Appeals sustained the motion of the American Trustee and dismissed the appeals. The decision was handed down January 15, 1959 (262 F. 2d 510). Issuance of the mandates was stayed upon application pending final disposition by this Court of petitions for certiorari which were filed by Kern and others. This Court denied such petitions on April 27, 1959 (359 U. S. 979). These proceedings consumed about eleven months.

The plan provides that steps should be taken to consummate it as soon as practicable following the date on which an order confirming it had become final and not subject to further review. Accordingly, promptly after denial of certiorari, counsel for the Inland Trustee began the preparation of various forms of documents which would be necessary in consummating the Plan, and, on May 13, 1959, filed a petition in the District Court for an order in aid of consummation of the plan. The petition did not raise any sub-

stantive questions, but merely sought an order to implement the District Court's decision confirming the plan.

On May 15, 1959, Kern and his associates filed in the District Court a motion for leave to file a petition for "Alterations and Modifications" of the plan. A hearing on the Inland Trustee's petition and Kern's motion was held in the District Court on May 28 and 29, 1959. By order entered on June 1, 1959, the District Court rejected the proposed petition for "Alterations and Modifications" and granted the petition of the Inland Trustee for an order to consummate the plan. Kern appealed, and the Court of Appeals affirmed the District Court January 27, 1960. This was the twelfth decision by the Court of Appeals in these proceedings. Kern now seeks review of said order and the decision of the Court of Appeals affirming it.

The Plan

To prepare the plan it was first necessary to fix the value of the assets of the debtors, and, after extensive hearings, the District Court, using the method approved by this Court (*Consolidated Rock Products Co. v. du Bois*, 312 U. S. 510), found the reorganization value of the Debtors' assets to be $10,538,800 as of December 31, 1957. No other valuation has been established. Nearly all of the assets were Inland's.

In very brief outline, the plan provides for the payment of reorganization expenses, taxes, etc., and unsecured claims against Inland, other than Columbia's, and then for payment in cash of

"(f) Claims of the holders, other than Columbia, of American Notes, including postbankruptcy interest.

"(g) Claims of the holders, other than Columbia, of Kentucky Bonds, excluding postbankruptcy interest.

"(h) Claims of the holders, other than Columbia, of Kentucky Debentures, including defaulted interest, but excluding postbankruptcy interest."

To enable the Trustees to pay the expenses and claims above referred to, the Inland Trustee was authorized to make a short-term borrowing from a bank of not to exceed $4,000,000. A new corporation is to be organized and the properties of the Debtors transferred to such new or reorganized corporation. The stock of the reorganized corporation will be issued to an escrow agent for the use and benefit of Columbia, such stock being valued by the plan at $3,021,576 as of December 31, 1957, and representing a partial payment on Columbia's secured direct claims against Inland.

Kern's so-called "Alterations and Modifications" begin by eliminating in its entirety Article I of the plan, which contains appropriate references to the District Court's directions (affirmed by the Court of Appeals) to the Trustees as to how the plan should be drawn and contains a statement of principles governing the reorganization. The Alterations then proceed to strike out everything in the plan except certain descriptive matter relating to the organization and history of the Debtors, and an entirely new plan is unfolded. Some of the important changes

proposed by the so-called "Alterations and Modifications" are stated in the majority opinion of the Court of Appeals (App. B of Petition, pp. 7c-9c).

Argument in Opposition to the Petition

I

The decision below does not present any important question of federal law.

Petitioners assume that the Court of Appeals (a) decided that a proposed alteration of a confirmed plan should be refused although the plan has not been consummated, and (b) ignored the solvency exception to the postbankruptcy interest rule. Both assumptions are incorrect, as we shall demonstrate.

In this case, which has been in court nearly thirty years, a plan of reorganization, after full hearings and all other proceedings required by law, was confirmed by the District Court. Appeals were taken from the confirmation order, and the District Court was affirmed by the Court of Appeals. This Court denied certiorari. Promptly thereafter the case came on for hearing on a petition by the Trustees for the entry of an order in aid of consummation of the confirmed plan. At this point Petitioners presented to the District Court so-called "Alterations and Modifications," which the Court found in fact constituted a new plan, and the Court refused to permit such new plan to be filed. The Court of Appeals affirmed. Thus the principal question presented is fairly stated above at page 2.

The majority opinion of the Court of Appeals very clearly shows that the District Court was affirmed

primarily on the ground that the so-called "Alterations and Modifications" were not that at all, but, in fact, constituted an entirely new plan. The following excerpts from the opinion, repeated here for convenience, are, we think, conclusive of this statement:

> "* * * A comparison of the proposed alterations and modifications of the Plan of Reorganization with the Plan, which we have heretofore affirmed, clearly reveals that the alterations and modifications under consideration are not merely such, but in totality *constitute an altogether new and different proposed plan of reorganization.*"
>
> "* * * *
>
> "Judge Ford stated that, had he sustained the position assumed by appellants and permitted the filing of their alterations or modifications, we would be 'starting fresh, turning around and going back on another theory.' We think the district judge did not abuse the discretion expressly granted him by the statute; but, on the contrary, we consider that he used sound common-sense, practical judgment in declining to permit an *altogether new plan* to be submitted, *under the guise of alterations and modifications*, in lieu of a sound plan already confirmed by him and approved by this appellate court, with certiorari denied by the Supreme Court of the United States."
>
> "* * * *
>
> "District Judge Ford aptly stated that section 222 authorizes modification, but does not authorize 'stopping in the middle of a

> stream and starting a new plan with all of its problems afresh.' We think that he wisely said, also, that the two plans 'are not kin in any respect in major problems', being incongruous rather than congruous."

That the decision is correct and the statement of the law contained in the majority opinion is sound appears from the statutes and the decisions. After a plan has been confirmed, and pending substantial consummation, the District Court may consider bona fide alterations and modifications, but may not consider a new or different plan, however disguised. Section 224 of the Bankruptcy Act provides that, upon confirmation, the plan and its provisions shall be binding upon the debtor and all creditors and stockholders. However, Section 222 provides that, before or after the plan is confirmed, it may be "altered or modified, with the approval of the judge." Then Section 229 defines when a plan shall be deemed to have been substantially consummated, and provides that after substantial consummation the plan may not be altered or modified if the proposed alterations or modifications materially or adversely affect creditors or stockholders.

Since Section 224 makes the plan binding upon the debtor and all stockholders and creditors from and after confirmation, a new plan may not thereafter be offered or considered. The only thing that can be done after such confirmation is that, under the provisions of Section 222, bona fide alterations and modifications may be filed with the approval of the District Judge whether or not they adversely affect the interests of creditors or stockholders. If they adversely

affect the interests of creditors or stockholders, further hearings are required; otherwise not. Anything that goes beyond a bona fide alteration or modification must necessarily constitute a new plan, and could not be filed or considered, because the provisions of Section 224 in effect forbid it. See *Diversey Building Corp. v. Metropolitan Trust Co.*, 141 F. 2d 65 (7 Cir. 1944); *Country Life Apartments v. Buckley*, 145 F. 2d 935 (2 Cir. 1944); *Knight v. Wertheim*, 158 F. 2d 838 (2 Cir. 1946) and *Prudence - Bonds Corp. v. City Bank Farmers Trust Co.*, 186 F. 2d 525 (2 Cir. 1951). Any other conclusion would mean that there is absolutely no finality to a Chapter X reorganization until substantial consummation of the plan, as provided in Section 229, and thus a case could be kept in court indefinitely after the confirmation of a plan by the simple expedient of filing new plan after new plan and appealing from adverse decisions of the District Judge. In the instant case the District Judge exercised his discretion, as provided in Section 222, and determined that the so-called "Alterations and Modifications" were not congruent with the plan and thus in effect constituted a new plan, and for that reason refused to permit them to be filed. The Court of Appeals affirmed, holding that the District Judge properly exercised his discretion. It is inconceivable that a matter of this sort would be regarded as an important question of federal law justifying the attention of the Supreme Court of the United States.

We do not wish to burden this Court with argument on Petitioners' second question as to their alleged right to receive postbankruptcy interest from Inland's assets. A brief statement will suffice.

It seems obvious that this question, since it is embodied in Petitioners' so-called "Alterations and Modifications" is properly presented only if the District Court abused its discretion in rejecting such "Alterations and Modifications." This it did not do. It may be noted, however, that, even if we assume for the sake of argument that the postbankruptcy interest question is properly before this Court, the Court of Appeals correctly construed its former decisions limiting the claims of the Kentucky creditors to principal. The only reason the Kentucky creditors are entitled to anything out of Inland's surplus assets is by the grace of the decision of the Court of Appeals. That same Court which created the right has very clearly limited it to principal with prebankruptcy interest, but not postbankruptcy interest (241 F. 2d 374; 262 F. 2d 510). The quantum of the claims of the Kentucky creditors depends upon the peculiar facts and equities of these proceedings, and we submit that the District Court and the Court of Appeals, by virtue of their long and intimate association with these proceedings, are uniquely qualified to determine the rights and equities of the Kentucky creditors, and these rights and equities have been litigated and re-litigated.

Under these circumstances, it can hardly be said that the postbankruptcy interest question is deserving of the attention of this Honorable Court.

II

There is no conflict between the decision below and *Knight* v. *Wertheim*, 158 F. 2d 838 (2 Cir. 1946).

Petitioners rely heavily upon a supposed conflict between the decision in the *Knight* case and the de-

cision in the instant case. In the *Knight* case the Court of Appeals held that the District Court erred in refusing to permit *bona fide amendments and modifications* to be filed after a plan had been confirmed but before it had been consummated. In the instant case the Court of Appeals held that the District Court did not err in refusing to permit a *new plan* to be filed after a plan had been confirmed but before it had been consummated. Thus there is no conflict. Again for convenience we quote from the majority opinion in the instant case to show how the matter was disposed of:

> "*Knight v. Wertheim*, 158 F. (2d) 838 (C. A. 2), is regarded by appellants as strong authority in their behalf. We do not agree with their argument for, in that case, Judge Learned Hand said that the proposed changes were not so radical as to fall within the ambit of the court's previous decision in the *Country Life Apartments v. Buckley* case. *Comparison of the facts of the Knight case with those in this litigation will show the cases to be plainly differentiable.*
>
> "* * * *
>
> "The contrast of the simple alteration approved in *Knight v. Wertheim, supra*, with the alterations and modifications proposed here is most striking. It would seem that any careful analysis of the plan which has been confirmed with the result reached should the alterations and modifications of Kern be adopted clearly demonstrates that his offering constitutes actually a *completely new and altogether different plan.*"

We find no decisions of this Court on the question of what constitutes bona fide alterations and modifi-

cations and what constitutes a new plan. No doubt the reason is that this Court has not seen fit to inquire into the details necessary for an examination of the question of whether or not the District Court properly exercised its discretion in determining what constitutes alterations and modifications and what constitutes a new plan. Here the District Judge, who has lived with this case for almost a generation, and who has an intimate knowledge of it, exercised his discretion and found that the so-called alterations and modifications were a new plan and for that reason should not be permitted to be filed. The Court of Appeals, also well acquainted with this case, affirmed.

It is respectfully urged that this is not a matter justifying the attention of this Honorable Court.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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